COMMENTARIES

ON THE

LAWS OF ENGLAND.

VOL. II.

OF THE RIGHTS OF THINGS.

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COMMENTARIES

ON THE

LAWS OF ENGLAND:

In Four Books.

BY

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ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

A New Edition,

ADAPTED TO THE PRESENT STATE OF THE LAW,

ROBERT MALCOLM KERR, LL.D.

BARRISTER-AT-LAW.

VOL. II.

OF THE RIGHTS OF THINGS.

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COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY IN GENERAL.

Rights of things.

THE former book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties as are annexed to the persons of men, the objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property; concerning the nature and origin of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

[2]

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give them-

Origin of property.

selves the trouble to consider the origin and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the [3] earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to

answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.*"[a] Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer:[b] or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.[c]

Primeval notions.

[4]

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have

Separate property.

[a] Justin. l. 43, c. 1.

[b] Barbeyr. Puff. l. 4, c. 4.

[c] *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupârit.* De Fin. l. 3, c. 20.

arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other.

Dwellings.

In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and homestall; which seem to have been originally mere temporary huts or moveable cabins, suited to the [5] design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant, which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

Food.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained

by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well." And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace.

Water.

[6]

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman empire.[d] We have also a striking example of the same kind in the history of Abraham and his nephew Lot. When their joint substance became so great, that pasture and

Land.

[d] *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit.* De Mor.Ger. 16.

other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not preoccupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, even as the garden of the Lord. Then Lot chose him all the plain of Jordan and journeyed east; and Abraham dwelt in the land of Canaan."

[7]

Colonization.

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother-country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture.

Agriculture.

And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more per-

manent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas [8] now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties as well as of exerting its *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants: states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

Occupancy of soil

The only question remaining is, how this property became actually vested; or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of

bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Abandonment of property.

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner has not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And, this we may remember, is the doctrine of the law of England with relation to treasure trove.

But this method of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or convey

ance: which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

Transfer of property.

[10]

The most universal and effectual way of abandoning property, is by the death of the occupant; when both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have

[11]

a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion.[e] And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

Inheritance.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate origin arose not from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest relations are usually about him [12] on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs, being immediately on the

[e] To prevent vacancy of possession, the civil law considers father and son as one person; upon the death of either, the inheritance does not so properly descend, as continue in the hands of the survivor. (Ff. 28, 2, 11).

spot when he died. For we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."

Wills and testaments.

While property continued only for life, testaments were useless and unknown: and when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament;* that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased; which we therefore emphatically style his *will.* This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth, and then only for a certain portion: for it was not till after the Restoration that the power of devising real property became so universal as at present.

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil and municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does anything vary more than the right of inheritance under different national establishments. In England, particularly, [13] this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. 'Until lately, although in personal estates the father might have succeeded to his children, in landed property he could not be their immediate heir:' in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal

estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

Rules of succession are arbitrary.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice: while others so scrupulously adhere to the supposed intention of the dead, that if a will 'be legally invalid from not having been executed with such formalities as the law requires,' they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person [14] who from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

Some things common.

But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his win-

Light, air, water.

dows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition; which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again: there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels [15] would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to everything capable of ownership a legal and determinate owner.

CHAPTER II.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

[16] THE objects of dominion or property are *things*, as contradistinguished from *persons:* and things are by the law of England distributed into two kinds; things *real* and things *personal.* Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place, as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

In treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* [17] is a word of still greater extent, and though in its vulgar acceptation, it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be *holden,* provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum,* frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like:[a] and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like

Land.

Tenements.

[a] Co. Litt. 6.

unsubstantial kind, are, all of them, legally speaking, tenements.[b] But an *hereditament*, says Sir Edward Coke,[c] is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal, or mixed. Thus, an heir-loom, or implement of furniture, which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.[d]

Hereditaments.

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke,[e] comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings; for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon: so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered*

Corporeal hereditaments.

[18]

Water.

[b] Co. Litt. 19, 20.
[c] 1 Inst. 6.
[d] 3 Rep. 2.
[e] 1 Inst. 4.

with water.[f] For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property; of which the law will take notice, but not of the other.

Land.

Land has also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum,* is the maxim of the law, therefore no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular [19] names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing: but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum,* every thing terrestrial will pass.[g]

[f] Brownl. 142.

[g] Co. Litt. 4, 5, 6. 'In many modern Acts of Parliament the signification of the word *lands* is still further extended, and it is made to conclude both tenements and hereditaments, and whether of a corporeal or an incorporeal nature. The Lands' Clauses Consolidation Act of 1845, which is one of wide application, being usually incorporated with and made to form part of Acts having for their object the acquisition of land for public undertakings, contains one of these special definitions, and another is found in the important Trustee Act, 1850. Such interpretations, however, only hold good for the particular Acts of Parliament which contain them, and for ordinary purposes the words lands, tenements, and hereditaments must be construed according to their ancient meanings.'

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within, the same.[a] It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession.

[20]

[21]

[a] Co. Litt. 19, 20.

Incorporeal hereditaments are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

1. Advowsons.

1. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection: and therefore is synonymous with patronage, *patronatus:* and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (from whence, as was formerly mentioned, arose the division of parishes), the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the patron.[b]

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be had of it. If the patron takes cor- [22] poral possession of the church, the churchyard, the glebe, or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, *viz.*, by writing under seal, which is evidence of an invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth, when it produces a visible corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter, and receive bodily possession of the lands and tenements of the church.

[b] This origin of the *jus patronatus*, appears also to have been allowed in the Roman empire. Nov. 26, t. 12, c. 2; Nov. 118, c. 23.

Advowsons are divided into advowsons *appendant*, and advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons of churches,[c] the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant:[d] and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words.[e] But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson in gross, or at large, and ('except such separation be limited in its duration, as for a term of years or for life,') it never can be appendant any more; but it is for the future annexed to the person of its owner, and not to his manor or lands.[f] 'An advowson may, however, at the same time, be partly *appendant* and partly *in gross;* as, for instance, if the lord of a manor to which an advowson is appendant should grant every second presentation to a stranger; it will be *in gross* for the turn of the stranger, and *appendant* for the turn of the lord.'

Advowsons appendant.

Advowsons in gross.

Advowsons are also either *presentative, collative,* or *donative.*[g] An advowson presentative is where the patron has a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson. An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution. An advowson donative, is when the sovereign, or any subject by his licence, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.[h] This is

Advowsons are presentative,

collative,

[23]

or donative.

[c] Co. Litt. 119.
[d] Co. Litt. 121.
[e] Co. Litt. 307.
[f] Co. Litt. 120.
[g] Co. Litt. 120.
[h] Co. Litt. 344.

said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop à Becket, in the reign of Henry II.[i] And therefore, though Pope Alexander III.[j] in a letter to à Becket, severely inveighs against the *prava consuetudo,* as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island, and in proof of it they allege a letter from the English nobility to the Pope in the reign of Henry the Third, recorded by Matthew Paris,[k] which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop in order to receive ordination, who was at liberty to examine and refuse him; but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the Pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the [21] advowson is now become for ever presentative, and shall never be donative any more.[l] For these exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, once gives up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings.[m]

[i] Seld. Tith. c. 12, § 2.

[j] Decretal. l. 3, t. 7, c. 3.

[k] A.D. 1239.

[l] Co. Litt. 344; Cro. Jac. 63.

[m] This strict rule, however applies only to donatives by prescription, for a donative created by letters patent has been held not to be destroyed even after more than one presentation (2 Salk. 541) In presentative ad-

II. Tithes, are predial, mixed, personal.

II. A second species of incorporeal hereditaments is 'or rather was that of tithes; for under the operation of the recent acts[*] for the commutation of tithes, to which I shall presently allude, tithes are or shortly will be no longer payable in kind. Still as the principal change introduced by these acts is to substitute the payment of an annual rent of fixed amount, for the render of a tenth of the titheable produce of lands or the payment of an arbitrary composition, it is necessary to explain the origin and nature of tithes.' Tithes, then, are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops, and wood:[n] the second *mixed*, as of wool, milk, pigs, &c.,[o] consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross: the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.[p]

It is not to be expected from the nature of these general Commentaries, that I should particularly specify what things were titheable, and what not, the time when, or the manner and proportion in which, tithes were usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes were to be paid for everything that yielded an annual or recurring increase, as corn, hay, fruit, cattle, poultry, and the like; but not for anything that was of the substance of the earth, or was not of annual or periodical increase, as stone, lime, chalk, and the like; nor for creatures of a wild nature, or *feræ naturæ*, as deer, hawks, &c., whose increase, so as to profit the owner, was not annual, but casual. It will rather be our business to consider, 1. The origin of the right of tithes. 2. In whom that right, or the right 'to receive the

[25]

vowsons, if the incumbent is made a bishop, the sovereign presents for that term, and this is called a prerogative presentation.

[n] 1 Roll. Abr. 635; 2 Inst. 649.

[o] 2 Inst. 649.

[p] 1 Roll. Abr 656. Tithes were also commonly divided into two classes, *great* and *small* tithes; the former, in general, comprehending corn, pease and beans, hay and wood; the latter, all other predial and mixed and personal tithes.

rent-charges which have been substituted for them, at present subsists. 3. Who is or may be discharged, either totally or in part from paying them.

Origin of tithes.

1. As to their origin, I will not put the title of the clergy to tithes upon any divine right, though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino;* whatever the particular mode of that maintenance may be. For, besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly, all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons by Augustin the monk, about the end of the sixth century. But the first mention of them which I have met with in any written English law, is in a constitutional decree, made in a synod held A.D. 786,[r] wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of [26] the kings of Mercia and Northumberland, the bishops, dukes, senators, and people: which was a very few years later than the time that Charlemagne established the pay-

[r] Seld. c. 8, § 2.

ment of them in France[s] and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy.[t]

The next authentic mention of them is in the *foedus Edwardi et Guthruni;* or the laws agreed upon between King Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws:[u] wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and accordingly, we find[v] the payment of tithes not only *enjoined* but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan,[w] about the year 930. And this is as much as can certainly be traced out, with regard to their legal origin.

2. To whom due.

2. We are next to consider the persons to whom tithes, 'or the rent-charges which have been substituted for them,' are due. And upon their first introduction (as has been observed in the first book of these Commentaries), though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased;[x] which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common.[y] But, when dioceses were divided into parishes, the tithes of each were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land.[z]

Parochial division.

[27]

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John:[a] which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the

[s] A.D. 778.
[t] Seld. c. 6, § 7; Sp. of Laws, b. 31, c. 12.
[u] 1 Thorpe, 171.
[v] Cap. 6.
[w] Cap. 1.
[x] 2 Inst. 646; Hob. 296.
[y] Seld. c. 9, § 4
[z] LL. Edgar, c. 1 & 2; Canut. c. 11.
[a] Seld. c. 11.

secular or parochial clergy (a much more valuable set of men than themselves), and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected: since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the Third[b] about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran held A.D. 1179, which only prohibited what was called the infeudation of tithes, or their being granted to mere laymen[c]; whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same Pope in other countries.[d] This epistle, says Sir Edward Coke,[e] bound not the lay subjects of this realm; but, being reasonable and just, (and, he might have added, being correspondent to the ancient law,) it was allowed of, and so became *lex terræ*. This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish has, though rarely, a right to claim in another; for it is now universally held,[f] that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, we have formerly seen, may be either the actual incumbent, or else

[28]

Portionists.

[b] Opera Innocent. III. tom. 2, page 452.

[c] Decretal. l. 3, t. 30, c. 19.

[d] Decretal. l. 3, t. 30, c. 26.

[e] 2 Inst. 641.

[f] Regist. 46; Hob. 296.

the appropriator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes.[g]

3. Exemptions.

3. We observed that these tithes were due to the parson of common right, unless by special exemption; let us therefore see, thirdly, who become exempted from the payment of tithes, and how lands, and their occupiers, might be exempted or discharged from the payment of tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription.

Real composition.

First, a real composition was when an agreement was made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands should for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof.[h] This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it was to take care of the church in general, and of the patron, whose interest it was to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law. But, experience showing that even this [29] caution was ineffectual, and the possessions of the church being, by this and other means, every day diminished, the disabling statute, 13 Eliz. c. 10, was made: which prevented, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years. So that by virtue of this statute, no real composition made since the 13 Eliz. was good for any longer term than three lives, or twenty-one years, though made by consent of the patron and ordinary: 'nor was the confirmation of such a composition by a decree of the Court of Chancery sufficient to bind the successor of the incumbent who made it. But now it is by

[g] In extra-parochial places the king, by his royal prerogative, has a right to all the tithes. See vol. i. p. 100.

[h] 2 Inst. 490; Regist. 38; 13 Rep. 40.

the statute 2 & 3 Will. IV. c. 100 enacted, that every composition which before the passing of that Act had been made or confirmed by the decree of a Court of Equity, in a suit to which the ordinary patron and incumbent were parties, and which had not since been set aside or departed from shall be held valid.'

2. Prescription de modo decimandi.

Secondly, a discharge by custom or prescription, was where time out of mind such persons or such lands had been, either partially or totally, discharged from the payment of tithes. And this immemorial usage was binding upon all parties; as it was in its nature an evidence of universal consent and acquiescence, and with reason supposed a real composition to have been formerly made. This custom, or prescription, was either *de modo decimandi,* or *de non decimando.*

Modus.

A *modus decimandi,* commonly called by the simple name of a *modus* only, was where there was by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which were the actual tenth part of the annual increase. This was sometimes a pecuniary compensation, as twopence an acre for the tithe of land: sometimes it was a compensation in work and labour, as, that the parson should have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing was altered, and a new method of taking them was introduced, was called a *modus decimandi,* or special manner of tithing.

[30]

1. Certain.

A good *modus* must have been *certain* and *invariable,* for payment of different sums would prove it to be no *modus,* that is, no original real composition; because that must have been one and the same, from its first origin to the present time. 2. The thing given in lieu of tithes must have been beneficial to the *parson,* and not for the emolument of *third persons* only: thus a *modus,* to repair the *church* in lieu of tithes, was not good, because that would be an advantage to the parish only; but to repair the *chancel* was a good *modus,* for that is an advantage to the parson. 3. It must have

2. Beneficial to parson.

been something *different* from the thing compounded for: one load of hay, in lieu of *all* tithe hay, was no good *modus;* for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe: and therefore the law would not suppose it possible for such composition to have existed. 4. One could not be discharged from payment of one species of tithe, by paying a *modus* for another. Thus a *modus* of 1*d.* for every *milch* cow would discharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one could never be a discharge for the other. 5. The recompense must have been in its nature as durable as the tithes discharged by it; that is, an inheritance certain: and therefore a *modus* that every *inhabitant* of a house should pay 4*d.* a-year, in lieu of the owner's tithes, was no good *modus;* for possibly the house might not be inhabited, and then the recompense would be lost. 6. The *modus* must not have been too large, which was called a *rank modus:* as if the real value of the tithes were 60*l. per annum,* and a *modus* were suggested of 40*l.*, this *modus* could not be established; though one of 40*s.* might have been valid. Indeed, properly speaking, the doctrine of *rankness* in a *modus* was a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law. For in these cases of prescriptive or customary *moduses,* it was supposed that an original real composition had been anciently made; which being lost by length of time, the immemorial usage was admitted as evidence to show that it did once exist, and that from thence such usage had been derived. Now time of memory has been long ago ascertained by the law to commence from the beginning of the reign of Richard the First;[1] and any custom might formerly have been destroyed by evidence of its non-existence in any part of the long period from that

3. Different from thing compounded for.

4. Not discharging another species of tithe.

5. Durable.

6. Not rank.

[31]

[1] 2 Inst. 238, 239. This rule was adopted, when by the statute of Westm. 1 (3 Edw. I. c. 39), the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. c. 2, this period (in a writ of right) was very rationally reduced to 60 years, it seems unaccountable, that the date of legal prescription or memory should still have continued to be reckoned from an æra so very antiquated. See Litt. § 170. 34 Hen. VI. 37. 2 Roll. Abr. 269, pl. 16. 'The modern statutes relating to prescription have now, in almost *all cases*, obviated the necessity of carrying back proof to this remote date.'

time to the present; wherefore, as this real composition was supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up were so rank and large, as that it beyond dispute exceeded the value of the tithes in the time of Richard the First, this *modus* was (in point of evidence) *felo de se*, and destroyed itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it was destroyed by carrying in itself this internal evidence of a much later origin.

'The necessity of entering into these questions, was in most cases taken away by the statute 2 & 3 Will. IV. c. 100, called the Tithe Prescription Act, which establishes certain limitations of *time*, after which claims of *moduses* are not to be questioned.[j] It enacts that all prescriptions and claims for any *modus decimandi* shall be sustained, and be deemed good and valid in law, upon evidence showing the payment of the *modus* during sixty years, or such greater period as shall include two incumbencies and the three years next following the commencement of a third incumbency; and when the tithe-owner is the crown, or any person or corporation, other than a corporation sole, proof of the enjoyment of the *modus* for thirty years only will generally be sufficient.'

3. Prescription de non decimando.

A prescription *de non decimando* was a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative was discharged from all tithes.[k] So a vicar paid no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ*.[l] But these *personal* privileges (not arising from or being annexed to the land) were personally confined to both the crown and the clergy; for though lands in their own occupation were not generally titheable, their tenants or lessees were liable to pay tithes.[m] And generally speaking, it was an established rule, that, in *lay* hands, *præscriptio de non* [32] *decimando non valet*.[n] But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always

Salkeld v. *Johnston*, 1 Mac. & G. 242.
[k] Cro. Eliz. 511.
[l] Cro. Eliz. 479, 511; Moor. 910.
[m] Cro. Eliz. 479.
[n] Cro. Eliz. 511; 2 Jac. & W. 527.

capable of having their lands totally discharged of tithes by various ways,[o] as, 1. By real composition: 2. By the Pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights Templars, Cistercians, and others, whose lands were privileged by the Pope with a discharge of tithes.[p] Though upon the dissolution of abbeys by Henry VIII., most of these exemptions from tithes would have fallen with them, and the lands become titheable again, had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacted, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them.[q] And from this origin have sprung all the lands which, being in lay hands, do at present claim to be tithe-free: and 'previously to the statute 2 & 3 Will. IV. c. 100,' if a man could show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before mentioned, this was a good prescription *de non decimando*. But he was bound to show both these requisites; for abbey lands, without a special ground of discharge, were not discharged of course; neither would any prescription *de non decimando* avail in total discharge of tithes, unless it related to such abbey lands.

Tithe-free lands.

'But the statute 2 & 3 Will. IV. c. 100, above referred to, did away with these inquiries as to the origin of the discharge, which often involved much inconvenience and expense, and established the same limitation of time with

[o] Hob. 309; Cro. Jac. 308.

[p] 2 Rep. 44; Seld Tith. c. 13, s. 2.

[q] This provision is peculiar to that statute, and therefore all the lands belonging to the lesser monasteries (*i. e.* such as had not lands of the clear yearly value of 200*l.*), dissolved by the 27 Hen. VIII. c. 28, remained liable to pay tithes. (Com. Dig. *Dism.*, E. 7). [CHRISTIAN] 'In like manner the lands belonging to the numerous alien priories and abbeys, dissolved in 1415, by the statute 2 Hen. V., remained liable to tithes. But the lands of the lesser monasteries, surrendered after the 27 Hen. VIII. c. 28, and of the knights of St. John, given to the king by the stat. 32 Hen. VIII. c. 24, are within the meaning of the statute 31 Hen. VIII. c. 13.'

regard to claims of total exemption from tithes, as those which were applicable to the claim of a *modus;* and the proof of non-payment of tithes during a period of sixty years without more, now constitutes a complete title to exemption.'[r]

'Tithes, however, have already to a considerable extent, and will soon have entirely, become mere matter of history, through the operation of the Tithe Commutation Acts. The first general statute of this class (for private acts for the same purpose had in particular cases been obtained) was the statute 6 & 7 Will. IV. c. 71, which has been amended by several subsequent statutes.[s] The same principle of legislation has also been extended to Ireland by 1 & 2 Vict. c. 109. The chief object of these statutes is to substitute the payment of an annual rent of defined amount for the render of a tenth of the titheable produce of the land, or the payment of an arbitrary composition. To effect this, the gross amount of the annual sums to be payable by way of rent-charge in substitution for the tithes is first ascertained. One-third of the amount, when ascertained and settled, is to be represented by such a quantity of wheat, another third by such a quantity of barley, and the remaining third by such a quantity of oats, as the rent-charge, if invested in the purchase of these three species of grain, would have purchased at their average prices per bushel, during seven years ending Christmas, 1835.[t] The tithe rent-charge is therefore in the nature of a corn rent, but the payment is made in money, and varies annually, according to the average septennial value of the above three species of grain on the Thursday next preceding Christmas-day in every year, as the same is published in the 'London Gazette' in the month of January.'

'The Tithe Commutation Acts are carried into effect by a Board of Commissioners, who are authorized to determine the value of the tithes in any parish, the lands subject thereto, the *modus,* composition real, prescriptive, or cus-

[r] *Salkeld* v. *Johnston.* 1 Mac. & G. 252.

[s] 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; (Ireland) 3 & 4 Vict. c. 13.

[t] These prices have been fixed by 1 Vict. c. 69, at 7*s.* 1¼*d.* for wheat, 3*s.* 11½*d.* for barley, and 2*s.* 9*d.* for oats.

tomary payment, if any, payable in lieu thereof, and the persons entitled to receive the tithes. They have power to hear and determine all disputes relative to these matters; and having determined the exact sum to be paid for the tithes of a parish, to apportion the payment thereof among the various lands, according to a valuation to be made by valuers appointed partly by the owners of the land subject to tithes, and partly by the tithe-owner. When the tithes are payable to any ecclesiastical person, in right of any spiritual benefice or dignity, the owners of lands chargeable with a tithe rent-charge may agree with him, subject to the confirmation of the commissioners, to substitute in lieu of the whole or any part of such rent-charge a portion of the land itself, provided the land so substituted shall not exceed twenty acres in one parish. The owners of land chargeable with a tithe rent-charge may also in most cases, under certain restrictions, obtain the entire exoneration of part of such land so charged, by having an increased amount of tithe rent-charge charged upon the residue of the land. And in cases where the sum charged upon any land does not exceed twenty shillings in amount, the owner of such land may redeem it by a payment of such sum as may be agreed upon, (not being less than twenty-four times the amount of the charge,) to the Governors of Queen Anne's Bounty, when the tithe-owner is a spiritual person entitled in respect of his benefice. If the owner of land subject to a tithe rent-charge is also entitled to the charge itself, he may by deed declare that such charge shall be merged; and tenants for life are also enabled by similar means to effect the same object.'

'With respect to lands used as hop-gardens, orchards, and market gardens, special provisions are made. The value of the tithes of such land is originally estimated on a principle similar to that pursued in regard to corn land. The amount to be charged is then divided into an ordinary and an extraordinary charge per acre; and grounds ceasing to be cultivated for such purposes are to be liable only to the ordinary charge, while newly-cultivated hop-grounds and market gardens are, after a certain time, to become subject to the additional or extraordinary charge.'

'These rent-charges, it may be added, are payable by two equal half-yearly payments, on the first of July and first of

January in every year, and are recoverable by distress and sale, but no person is personally liable to them. The tithe rent-charge takes precedence of all other liabilities to which land may be subject. Although varying slightly from year to year, according to the fluctuation of the corn market, its average amount for a series of years is easily calculable; and in every respect it is a much less inconvenient impost than that for which it has been substituted. Since the passing of the Act 6 & 7 Will. IV. c. 71, a very large proportion of the lands formerly titheable have been brought under its operation, and in no short space of time *tithes*, as such, will have entirely ceased to exist.'

[33]

III. Common.

III. Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man has in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like.[u] And hence common is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers.

1. Of pasture.

1. Common of pasture is a right of feeding one's beasts on another's land: for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.[v]

Appendant.

Common *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right: and it was originally permitted,[w] not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lords' wastes, and on the uninclosed fallow grounds of themselves and the other tenants.

[u] Finch, L. 157. [v] Co. Litt. 122. [w] 2 Inst. 86.

The law therefore annexed this right of common, as inseparably incident to the grant of the lands; and this was the origin of common appendant; which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England.[x] Common *appurtenant* arises from no connexion of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships,[y] or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This, not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by 'special grant,' or by 'prescription,'[z] which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage,* or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. [34] This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither has any person of one town a right to put his beasts originally into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass.[a] Common *in gross,* or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

Appurtenant.

In gross.

All these species of pasturable common may be, and usually are, limited as to number and time; 'commons without stint and lasting all the year were formerly recognized by legal writers, but such commons have not even a theoretical existence at the present day.' By the statute of Merton,

Limited or without stint.

[x] Stiernh. de Jure Sueonum, l, 2, c. 6.

[y] Cro. Car. 482. 1 Jon. 397.

[z] Co. Litt. 121, 122.

[a] Co. Litt. 122.

however, and other subsequent statutes,[b] the lord of a manor may inclose so much of the waste as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled thereto. This inclosure, when justifiable, is called in law, "approving:" an ancient expression signifying the same as "improving."[c] The lord has the sole interest in the soil; but the interest of the lord and the commoner in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage.[d]

'For many years past commons have been inclosed with the aid of Acts of Parliament, private and public. Recently these operations have been systematised by the General Inclosure Acts,[e] under which Commissioners have been appointed for the purpose of superintending inclosures; and by this means the process has been rendered much less difficult and expensive than it formerly was.'

2 & 3. Piscary and turbary.

2, 3. Common of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground.[f] There is also a common for digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; [35] though in one point they go much farther; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aftermentioned, are a right of carrying away the very soil itself.

4. Estovers.

4. Common of estovers, or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word *bote*, is used by us as synonymous to the French *estovers:* and therefore house-bote is a sufficient allowance of wood, to repair, or to burn, in the house; which latter is sometimes called fire-bote; plough-

[b] 20 Hen. III. c. 4, 29 Geo. II. c. 36, and 31 Geo. II. c. 41.

[c] 2 Inst. 474.

[d] 9 Rep. 113.

[e] 41 Geo. III. c. 109; 1 & 2 Geo. IV. c. 23; 3 & 4 Will. IV. c. 87; 3 & 4 Vict. c. 41; 8 & 9 Vict. c. 118; 15 & 16 Vict. c. 79.

[f] Co. Litt. 122.

bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote, or hedge-bote, is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.[g]

These several species of common do all originally result from the same necessity as common of pasture; viz., for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family: common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. Rights of way.

IV. A fourth species of incorporeal hereditaments is that of *ways;* or the right of going over another man's ground. I speak not here of the public highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil.

By grant.

This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to [36] market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company.[h]

By prescription.

A way may be also by prescription: as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created.

Of necessity

A right of way may also arise by act and operation of law: for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly

[g] Co. Litt. 41; 11 Rep. 46 b.

[h] Finch, L. 31.

gives me a way to come at it; and I may cross his land for that purpose without trespass.[i] For when the law gives anything to one, it gives impliedly whatsoever is necessary for enjoying the same.[j] By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England seems to correspond with that of Rome, 'as to highways and private ways having their origin in the necessity of the thing.[k] But where a private right of way is founded upon a grant or prescription, it will depend upon the real or presumed terms of the grant, whether the claimant of the right can under any circumstances be authorised to deviate from the ordinary path.'[l]

V. Offices.

V. Offices, which are a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators.[m] Neither can any *judicial* office be granted in reversion: because, though the grantee may be able to perform it at the time of the grant; yet before [37] the office falls, he may become unable and insufficient: but *ministerial* offices may be so granted;[n] for those may be executed by deputy. Also, by statute 5 & 6 Edw. VI. c. 16, no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it.[o] For the law presumes that he who buys an office will by bribery, extortion, or other

[i] Finch, L.

[j] Co. Litt. 56.

[k] Lord Raym. 725; 1 Brownl. 212; 2 Show. 28; 1 Jon. 297; Smith's Leading Cases, 4th ed. p. 113.

[l] 4 M. & Sel. 392; 2 Dougl. 749. As to the mode of establishing a claim to a right of way by prescription, *see* chap. xviii. of Prescriptions.

[m] 9 Rep. 97.

[n] 11 Rep. 4.

[o] And see 12 Ric. II. c. 2; 49 Geo. III. c. 126; 6 Geo. IV. cc. 82, 83; 11 Geo. IV. c. 20.

unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the first book of these Commentaries: it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VI. Dignities.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is,[p] a royal privilege, or branch of the sovereign's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the grant of the sovereign; or, in some cases, may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested either in natural persons or bodies politic; in one man or in many; but the same identical franchise, that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant.[q]

VII. Franchises.

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are—to hold a court-leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause

County Palatine.

Court-leet, manor, &c.

[38]

Fair.

Tolls.

[p] Finch, L. 164.

[q] 2 Roll. Abr. 191. Keilw. 196.

of commencement (as in consideration of repairs or the like), else the franchise is illegal and void;[r] or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

Forest.

As to a *forest:* this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws.[s] But a *chase* differs from a park, in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an inclosed chase, extending over a man's own grounds. The word *park* indeed properly signifies an inclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal *park:* for the grant of the crown, or at least immemorial prescription, is necessary to make it so;[t] although now the difference between a real park, and such inclosed grounds, is not very material. It was unlawful at common law for any person to kill any beasts of park or chase,[u] except such as possessed these franchises of forest, chase, or park; 'but this is, as we have seen, no longer the case.' *Free warren* is a similar franchise erected for preservation or custody (which the word signifies) of beasts and fowls of warren;[v] which, being *feræ naturæ,* every one had a natural right to kill as he could; but upon the introduction of the forest laws, at the Norman conquest, as will be shown hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on

Chase. Park. Free warren. [39]

[r] 2 Inst. 220.

[s] 4 Inst. 314.

[t] Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

[u] These are properly buck, doe, fox, martin, and roe; but in a common and legal sense extend likewise to all the beasts of the forest, which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venery or hunting. (Co. Litt. 233.)

[v] The beasts are hares, conies, and roes; the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (Co. Litt. 233.)

condition of his preventing other persons. A man, therefore, that has the franchise of warren, is in reality no more than a royal gamekeeper; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free warren.[w] This franchise is fallen into disregard, the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times who have sold their estates, and reserved the free warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free warren over another's ground.[x] A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed;[y] though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter: and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested. This opening was extended by the second and third charters of Henry III. to those also that were fenced under Richard I.; so that a franchise of free fishery must be at least as old as the reign of Henry II. This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil,[z] which in a free fishery is not requisite. It differs also from a *common* of piscary before mentioned, in that the free fishery is an exclusive right, the common of piscary is not so: and therefore in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards.[a] Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor. But to consider such right as originally a flower of the prerogative, till restrained by *Magna Charta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to

Free fishery.

Several fishery.

[40]

[w] Salk. 637.

[x] Bro. Abr. tit. Warren, 3.

[y] Seld. Mar. Claus. 1. 24. Dufresne, V. 503. Crag. de Jur. Feud. II. 8, 15.

[z] M. 17 Edw. IV. 6. P. 18 Edw. IV. 4. T. 10 Hen. VII. 24, 26. Salk. 637. 5 B. & Cr. 875.

[a] F. N. B. 88. Salk. 637.

distinguish it (as we have done) from a *several* and a *common* fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities[b] which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. Corodies.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance.[c] In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities.

IX. Annuities, which are much of the same nature, only that these arise from temporal, as the former from spiritual

[41]

persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor.[d] ' Therefore, if a man by deed grant to another the sum of 20*l.* *per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity; which is of so little account in the law, that, if granted to an eleemosynary corporation, it is not within the statutes of mortmain;[e] and yet a man may have a real estate in it, though his security is merely personal.

'The statute 17 Geo. IV. c. 26, reciting "that the pernicious practice of raising money by the sale of life annuities hath of late years very greatly increased, and is much promoted by the secrecy with which such transactions are con-

[b] Hargrave's notes on Co. Litt. 122.
[c] Finch, L. 162.
[d] Co. Litt. 144.
[e] Co. Litt. 144.

ducted," provided for a registration in the Court of Chancery of all deeds granting such annuities. This statute was repealed and re-enacted by the Act 53 Geo. III. c. 141, which provided that every instrument creating an annuity for one or more lives, or for a term determinable on one or more lives, should be null and void, unless a memorial of the date thereof, and of the names of the parties and witnesses thereto and of the person or persons for whose life or lives the annuity was granted, of the grantor and grantee, and of the pecuniary consideration for the same, were enrolled in Chancery within thirty days after the execution of the instrument. This Act, one object of which (s. 6) was to protect infants and unwary persons from the consequences of imprudent bargains, has now been repealed by the 17 & 18 Vict. c. 90, which has abolished the last vestiges of the laws relating to usury. The latter Act does not affect transactions previous to Aug. 10, 1854. It is provided, however, by stat. 18 & 19 Vict. c. 15, s. 12, that as against purchasers, mortgagees, and creditors, annuities granted by any other instruments than marriage settlements, shall not be valid unless registered in the Court of Common Pleas.'

Registration of grants of annuities.

'At common law annuities were not apportionable, on the ground that an entire contract cannot be apportioned, and the contract being to pay a fixed sum at a fixed day during life, the death of the party on whose life the payment depended, put an end to such contract entirely. But now, by stat. 3 & 4 Will. IV. c. 22, annuities payable at fixed periods, granted by any instrument executed subsequent to 16th June, 1834, shall, in the absence of express stipulation between grantor and grantee to the contrary, be apportionable, so that on a person entitled to an annuity dying in the interim between the days of payment, his representatives may receive a proportionate part of the annuity.'

Apportionment.

X. Rents are the last species of incorporeal hereditaments. The word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance.[f] It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit;* yet there is no

X. Rents.

[f] Co. Litt. 144.

occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent.[g] It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain;* or that which may be reduced to a certainty by either party. It must also issue *yearly;* though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year:[h] yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted.[i] It must, lastly, issue out of *lands and tenements corporeal;* that is, from some inheritance whereunto the owner or grantee of

[42]

the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like.[j] But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action for debt:[k] though it does not affect the inheritance, and is no legal rent in contemplation of law.

Rent-service.

There are at common law[l] three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it has some corporal service incident to it, as at the least fealty or the feudal oath of fidelity.[m] For, if a tenant holds his land by fealty, and ten shillings rent, or by the service of ploughing the lord's land, and five shillings rent, these pecuniary rents being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrears, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he has in himself the reversion,

g Co. Litt. 142.
h Co. Litt. 47.
i Plowd. 13. 8 Rep. 71.
j Co. Litt. 144.
k Co. Litt. 47.
l Litt. §. 213.
m Co. Litt. 142.

or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired.[n] A *rent-charge* is where the owner of the rent has no future interest, or reversion expectant in the land; as where a man by deed makes over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it.[o] *Rent-seck, reditus siccus* or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

Rent-charge.

Rent-seck.

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor,[p] which cannot be departed from or varied. Those of the freeholders are frequently called *chief*-rents, *reditus capitales;* and both sorts are indifferently denominated *quit*-rents, *quieti reditus;* because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white*-rents, or *blanch-farms, reditus albi;* in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri*, or *black-mail.*[q] *Rack*-rent is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge• issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation;[r] for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual methods for life or years.

Quit-rents.

[43]

Rack-rent.

Fee-farm rent.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assize, and chief-rents, as in case of rents reserved upon lease.[s]

Distress.

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the

[n] Litt. § 215.
[o] Co. Litt. 143.
[p] 2 Inst. 19.
[q] 2 Inst. 19.
[r] Co. Litt. 143.
[s] Stat. 4 Geo. II. c. 28.

reservation:[t] but in the case of the sovereign, the payment must be either to his officers at the Exchequer, or to his receiver in the country.[u] And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved;[v] though perhaps not absolutely due till midnight.[w]

'At common law, if a landlord tenant for life died between the days on which the rent of a lessee of the lands fell due, his personal representatives were entitled to nothing in respect of the rent so accruing, nor was the reversioner entitled to anything more than a payment for the use and occupation of the land from the death of the tenant for life. This inconvenience was remedied by the stat. 11 Geo. II. c. 19, s. 15, which enabled the personal representatives of the tenant for life to recover a proportionate part of the rent up to the day of his death. This enactment has been extended by 4 & 5 Will. IV. c. 22, to all cases of leases determinable on the death of the lessor, although he be not strictly tenant for life.'

With regard to the origin of rents, something will be said in the next chapter; and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our Commentaries, which will treat of civil injuries, and the means whereby they are redressed.

[t] Co. Litt. 201.
[u] 4 Rep. 73.
[v] Co. Litt. 302. 1 Anders. 253.
[w] 1 Saund 287. Salk. 578.

CHAPTER IV.

OF THE FEUDAL SYSTEM.

[44] IT is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use; as in viewing the majestic ruins of Rome or Athens, of Baalbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.

[45] Northern origin of the feudal system.

The constitution of feuds[a] had its origin from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium*, as Craig very justly entitles it,[b] poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was introduced by them in their respective colonies as the most

[a] See Spelman, of Feuds, and Wright, of Tenures, *per tot.*

[b] De Jure Feud. 19, 20.

likely means to secure their new acquisitions: and, to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs or fees; which last appellation in the northern languages[c] signifies a conditional stipend or reward.[d] Rewards or stipends they evidently were; and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis* or oath of fealty:[e] and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.[f]

Allotments, thus acquired, naturally engaged such as accepted them to defend them; and, as they all sprang from [46] the same right of conquest, no part could subsist independent of the whole, wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to, and under the command of, his immediate benefactor or superior; and so upwards to the prince or general himself: and the several lords were also reciprocally bound in their respec-

[c] Wright, 7.

[d] Spelm. Gl. 216.

[e] Pontoppidan, in his history of Norway (page 290), observes, that in the northern languages **odh** signifies *proprietas* and **all** *totum*. Hence he derives the **odhal** right in those countries; and hence, too, perhaps is derived the *udal* right in Finland, &c. (See Mac Doual, Inst. part 2.) Now the transposition of these northern syllables, **allodh**, will give us the true etymology of the *allodium*, or absolute property of the feudists; as, by a similar combination of the latter syllable with the word **fee** (which signifies, we have seen, a conditional reward or stipend), **feeodh** or *feodum* will denote stipendiary property. 'Etymologists have proposed several other derivations. But it must be admitted that the origin of these two words, which, be it observed, do not occur in any of the Teutonic languages, but are found only in their Latin form, still remains obscure.'

[f] See this oath explained at large in Feud. l. 2, t. 7.

[g] Feud. l. 2, t. 24.

tive gradations, to protect the possessions they had given. Thus the feudal connexion was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly-acquired country;[h] the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

The universality and early use of this feudal plan among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded[i] of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the Christian æra. They demanded of the Romans, "*ut martius populus aliquid sibi terræ daret, quasi stipendium: cæterum, ut vellet, manibus atque armis suis uteretur.*" The sense of which may be thus rendered: they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lord should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence, too, it is probable that the Emperor Alexander Severus[j] took the hint, of dividing lands conquered from the enemy among his generals and victorious soldiery, duly stocked with cattle and bondmen, on condition of receiving military service from them and their heirs for ever.

[47]

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their

[h] Wright, 8.

[i] L. Florus, l. 3, c. 3.

[j] "*Sola, quae de hostibus capta sunt, limitaneis ducibus et militibus donavit; ita ut eorum ita essent, si haeredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, si etiam sua rura defenderent. Addidit sane his et animalia et servos, ut possent colere quod acceperant; ne per inopiam hominum vel per senectutem desererentur rura vicina barbariæ, quod turpissimum ille ducebat.*" (Æl. Lamprid. in vita Alex. Severi.)

constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (that is, wholly independent, and held of no superior at all), now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty.[k] And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs; so that the feudal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit.*[l]

[48]

William the Norman.

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as part of the national constitution, till the reign of William the Norman.[m] Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe.[n]

This introduction, however, of the feudal tenures into Eng-

[k] Wright, 10.

[l] Gravin. Orig. l. 1, § 139.

[m] Spelm. Gl. 218. Bract. l. 2, c. 16.

[n] Crag. l. 1, t. 4. As to the Anglo-Saxon constitution, *see* Kemble's *Saxons in England.*

land by William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the Conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation long after his title was first established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrection of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions; which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favourites: a supposition, grounded upon a mistaken sense of the word *conquest*, which, in its feudal acceptation, signifies no more than *acquisition;* and this has led many hasty writers into a strange historical mistake, and one which upon the slightest examination will be found to be most untrue. However, certain it is that the Normans now began to gain very large possessions in England; and their regard for the feudal law under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon Chronicle (A.D. 1085), that in the nineteenth year of William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the

Conquest.

[49]

nobility to listen to his proposals for putting them in a posture of defence. For, as soon as the danger was over, the king held a great council to inquire into the state of the nation;[o] the immediate consequence of which was the compiling of the great survey called Domesday-book, which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum, where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.[p] This may possibly have been the æra of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant,[q] and couched in these remarkable words: "*Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as Sir Martin Wright has observed[r]) are plainly feudal; for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection, which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti.*"

Domesday.

[50]

This new polity therefore seems not to have been *imposed*

[o] *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hâc terrâ; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. A.D. 1085.

[p] *Omnes prædia tenentes, quotquot essent notae melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta praestiterunt, se contra alios quoscunque illi fidos futuros.* Chron. Sax. A.D. 1086.

[q] Cap. 52. 1 Thorpe, 490.

[r] Tenures, 66.

by the Conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees a large part of the allodial estates in France were converted into feuds, and the freeman became the vassals of the crown.[t] The only difference between this change of tenures in France and that in England was, that the former [51] was effected gradually, by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation.

The king the original proprietor.

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom;[u] and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services." For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce,

[t] Montesq. Sp. L. b. 31, c. 8; but see Hallam's *Middle Ages*, vol. i. ch. 2, pt. 1.

[u] *Tuit fuit in luy, et vient de luy a commencement.* (M. 24 Edw. III. 65.)

not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations;[v] as if the English had, in fact as well as theory owed everything they had to the bounty of their sovereign lord.

[52] Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the Crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth.[w] However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines; but their successor, Henry I., found it expedient, when he set up his pretensions to the Crown, to promise a restitution of the laws of King Edward the Confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which had engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated by himself and succeeding princes; till, in the reign of King John, they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous Great Charter at Runnymead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities (especially as altered on its last edition by his son) are very greatly short of those granted by Henry I., it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the prerogative,

William II.

Henry I.

John.

Henry III.

[v] Spelm. of Feuds, c. 28.

[w] Wright, 81.

extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

[53]

Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the origin of such of our own tenures, as were either abolished in the last century, or still remain in force.

Principle of feuds.

The grand and fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately of the Crown. The grantor was called the proprietor, or *lord;* being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession according to the terms of the grant, was styled the feudatory or *vassal,* which was only another name for the tenant or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi;* which are still the operative words in our modern conveyances. The grant itself was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals; which perpetuated among them the æra of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Grant.

Fealty and homage.

Besides an oath of *fealty,* or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered,

[54] and holding up his hands both together between those of the lord, who sat before him; and there professing, that "he did become his *man*, from that day forth, of life and limb and earthly honour:" and then he received a kiss from his lord.[x] Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*.[y]

Services.

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold: to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts-baron (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants), in order, as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feudal institutions, both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence, and under the direction of his grand justiciary; till, in many countries, the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserv- [55] ing to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last

[x] Litt. § 85.

[y] It was an observation of Dr. Arbuthnot, that tradition was nowhere preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134, 8vo.) It will not, I hope, be thought puerile to remark, in confirmation of this observation, that in one of our ancient juvenile pastimes (the *king I am*, or *basilinda* of Julius Pollux, Onomastic. l. 9, c. 7), the ceremonies and language of feudal homage are preserved with great exactness.

resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

Feuds at the will of the lord,

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord,[z] who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year; an annual distribution of lands being made by their leaders in their general councils or assemblies.[a] This was professedly done, lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory.[b] But still feuds were not yet *hereditary*, though frequently granted, by the favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services:[c] and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance; or, in the words of the feudal writers, "*incertam et caducam hereditatem relevabat.*" This relief

for years.

for life.

[56]

Reliefs.

Feud. l. 1, t. 1.
Tacitus, de Mor. Germ. c. 26.
[b] Feud. l. 1, t. 1.
[c] Wright, 14

was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

Descent.

For, in process of time, feuds came by degrees to be universally extended beyond the life of the first vassal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation.[d] But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory."[e] And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found, upon many accounts, inconvenient (particularly, by dividing the services, and thereby weakening the strength of the feudal union), and *honorary* feuds (or titles of nobility) being [57] now introduced, which were not of a divisible nature, but could only be inherited by the eldest son;[f] in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.[g]

Feuds inalienable.

Other qualities of feuds were, that the feudatory could not alien or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the

[d] Wright, 17.
[e] Wright, 183.
[f] Feud. 2, t. 55.
[g] Wright, 32.

consent of the lord.[h] For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself or from his posterity, who were presumed to inherit his valour, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord:[i] it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior one not of his own choosing.

These were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons; though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the origin of rents, and by these means the feudal polity was greatly extended; these inferior feudatories being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords.[j] But this at the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken: and under

Rents.

[58]

[h] Wright, 29. [i] Wright, 30. [j] Wright, 20.

that of improper or derivative feuds were comprised all such as did not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine, and proper feud.

But, as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters.

CHAPTER V.

OF THE ANCIENT ENGLISH TENURES.

[59] IN this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments, might have been holden, as the same stood in force, till the middle of the seventeenth century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles, and no other; being fruits of, and deduced from, the feudal policy.

Tenure. Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the sovereign, who is styled the lord *paramount*, or above all. Such tenants as held under the crown immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a mesne lord: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail or profit of the land.[a] In this manner are all

Lord paramount.

Mesne lords.

[60]

Tenant paravail.

[a] 2 Inst. 296.

the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke, in the law of England we have not properly *allodium;* which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

Tenants *in capite.*

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite,* or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burdensome services, than inferior tenures did. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. Four species of lay tenure.

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain.*

Free services.

[61]

Free services were such as were not unbecoming the character of a soldier or a freeman to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like.

Base services.

Base services were such as were fit only for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments.

Certain services.

The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days.

Uncertain services.

The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in Eng-

land, till the middle of the seventeenth century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern; of which the following is the outline or abstract. "Tenements are of two kinds, *frank-tenement* and *villenage*. And, of frank-tenements, some are held freely in consideration of homage and *knight-service;* others in *free-socage,* with the service of fealty only." And again, "of villenages some are pure, and others privileged. He that holds in *pure villenage* shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage;* and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain,* as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare,* or by knight-service. Secondly, where the service was not only *free,* but also *certain,* as by fealty only, by rent and fealty, &c., that tenure was called *liberum socagium,* or free socage. These were the only *free* holdings or tenements; the others were *villeinous* or servile: as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium,* absolute or pure villenage. Lastly, where the service was *base* in its nature, but reduced to a *certainty,* this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum;* or it might be still called socage (from the *certainty* of its services), but degraded by their *baseness* into the inferior title of *villanum socagium,* villein-socage.

[62]

I. Knight-service.

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare;* and in law-French *chivalry,* or *service de chivaler,* answering to the *fief d'haubert* of the Normans,[b] which name is expressly given it by the Mirrour.[c] This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely

[b] Spelm. Gloss. 219.

[c] C. 2, § 27.

military, and the genuine effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare;* the measure of which in 3 Edw. I. was estimated at twelve plough-lands,[d] and its value (though it varied with the times[e]) in the reigns of Edward I. and Edward II.[f] was stated at 20*l.* *per annum.* And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon:[g] which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was [63] only bound to attend twenty days, and so in proportion.[h] And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

Incidents of knight-service.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi;*[i] was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz., aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and show to be of feudal origin.

1. Aids.

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress;[j] but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fide-

[d] Pasch. 3 Edw. I. Co. Litt. 69.

[e] 2 Inst. 596.

[f] Stat. Westm. 1, c. 36. Stat. de Milit. 1 Edw. 2. Co. Litt. 69.

[g] See writs for this purpose in Memorand. Scacch. 36, prefixed to Maynard's Year-book, Edw. II.

[h] Litt. s. 95.

[i] Co. Litt. 9.

[j] *Auxilia fiunt de gratiâ, et non de jure,—cum dependeant ex gratiâ tenentium, et non ad voluntatem dominorum.* Bracton, l. 2, tr. 1, c. 16, § 8.

lity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigour of the feudal law an absolute forfeiture of his estate.[k] Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms:[l] the intention of it being to breed up the eldest son and heir apparent of the seignory to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants.[m] And one cannot but observe in this particular the great resemblance in which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; viz., to marry the patron's daughter; to pay his debts; and to redeem his person from captivity.[n]

[64]

But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately

[k] Feud. l. 2, t. 24.

[l] 2 Inst. 233.

Philips's Life of Pole, I. 223.

[n] *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul Manutius, de Senatu Romano, c. 1.

of the king, who had no superior. To prevent this abuse, King John's *Magna Charta* ordained that no aids be taken by the king without consent of parliament, nor in anywise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III.'s charter, and the same oppressions were continued till the 25 Edward I., when the statute called *confirmatio chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus re-[65] strained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable; and that the aids taken by the king of his tenants *in capite* should be settled by parliament. But they were never completely ascertained and adjusted till the statute Westm. 1, 3 Edward I. c. 36, which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter: and the same was done with regard to the king's tenants *in capite*, by statute 25 Edward III. c. 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. Reliefs.

2. Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with the lord for taking up the estate, which had lapsed or fallen in by the death of the last tenant. But though reliefs had their origin while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir.[o] The English ill brooked this consequence of their new-adopted policy; and therefore William the Conqueror by one of his laws *ascertained* or fixed the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls,

[o] Wright, 99.

barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s.* William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal law: thereby in effect obliging every heir to new-purchase or *redeem* his land:[p] but his brother Henry I., by the charter before mentioned, restored [66] his father's law, and ordained, that the relief to be paid should be according to the law so established, and not an arbitrary redemption.[q] But afterwards, when, by an ordinance in 27 Henry II., called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100*s.* for every knight's fee; as we find it ever after established.[r] But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

3. Primer seisin.

3. *Primer seisin* was a feudal burden, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession: and half a year's profits, if the lands were in reversion expectant on an estate for life.[s] This seems to be little more than an additional relief, but grounded upon this feudal reason—that, by the ancient law of feuds, immediately upon a death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and a day, it was by the strict law a forfeiture.[t] This practice, however, seems not to have long obtained in

[p] 2 Roll. Abr. 514.

[q] "*Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" (Text. Roffens. cap. 34. 1 Thorpe, 449.)

[r] Glanv. l. 9, c. 4. Litt. § 112.

[s] Co. Litt. 77.

[t] Feud. l. 2, t. 24.

England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords.[u] The king was entitled to enter and receive the [67] whole profits of the land, till livery was sued; which suit being commonly made within a year and a day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land.[v] And this afterwards gave a handle to the Popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. Wardship.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female,[w] the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1, 3 Edward I. c. 22, the two additional years being given by the legislature for no other reason but merely to benefit the lord.[x]

This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon

[u] Stat. Marlb. c. 16. 17 Edw. II. c. 3.
[v] Staundf. Prerog. 12.
[w] Litt. § 103.
[x] Litt. § 103.

feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might, out of the profits thereof, provide a fit person to supply the infant's services, till he should be of [68] age to perform them himself. And if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I. before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the most proper person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

Livery or ousterlemain.

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*;[y] that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *Magna Charta*. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins.[z] In order to ascertain the profits that arose to the Crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county,[a] commonly called an *inquisitio post mortem;* which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by [69] which it was holden, and who, and of what age his heir was:

Inquisitio post mortem.

[y] Co. Litt. 77. [z] Co. Litt. 77. [a] Hoveden, sub. Ric. I.

thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII., that, by colour of false inquisitions, they compelled many persons to sue out livery from the Crown, who by no means were tenants thereunto.[b] And afterwards, a court of wards and liveries was erected for conducting the same inquiries in a more solemn and legal manner.[c]

Court of wards.

Knighthood.

When the heir thus came of full age, provided he held a knight's fee *in capite* under the Crown, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroic times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony is supposed to have been the origin of the feudal knighthood.[d] This prerogative, of compelling the king's vassals to be knighted, or pay a fine, was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI. and Queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I.: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the Crown, and it was accordingly abolished by statute 16 Car. I. c. 20.[e]

[70]

[b] 4 Inst. 198.

[c] Stat. 32 Hen. VIII. c. 46. 33 Hen. VIII. c. 22.

[d] Tacitus, de Mor. Germ. cap. 13.

[e] I do not find that this prerogative was confined to the king's tenants: Lord Coke does not make that distinction in his commentary on the stat. *de milit.* (2 Inst. 593.) Nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. VI. and Queen

5 Marriage of wards.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimonium*), which in its feudal sense signifies the power, which the lord or guardian in chivalry had, of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian;[f] that is, so much as a jury would assess, or any one would *bonâ fide* give to the guardian for such an alliance;[g] and if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii*.[h] This seems to have been one of the greatest hardships of our ancient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy:[i] but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feudal origin; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards;[j] which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since, in the often-cited charter of Henry the First, he engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. [71] But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having

Elizabeth; which see in 15 Rym. Foed. 124 and 493. See 16 Car. I. c. 20, and 2 Rushw. 70. [CHRISTIAN.]

[f] Litt. § 110.

[g] Stat. Mert. c. 6. Co. Litt. 82.

[h] Litt. § 110.

[i] Bract. l. 2, c. 37, § 6.

[j] Gr. Coust. 95.

previous notice of the contract; or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate suâ.* But these provisions in behalf of the relations were omitted in the charter of Henry III.: wherein the clause stands merely thus, "*hæredes maritentur absque disparagatione:*" meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage[k] of heirs male; and as Glanvil[l] expressly confines it to heirs female. But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive fœmina*, as Bracton more than once expresses it:[m] and also, as nothing but disparagement was restrained by *Magna Charta*, they thought themselves at liberty to make all other advantages that they could.[n] And afterwards this right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton (20 Henry III. c. 6); which is the first direct mention of it that I have met with, in our own or any other law.[o]

[k] The words *maritare* and *maritagium* seem *ex vi termini* to denote the providing of a *husband*.

[l] l. 7, cc. 9 and 12, and l. 7, c. 4.

[m] l. 2, c. 38, § 1.

[n] Wright, 97.

[o] What fruitful sourses of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the Crown, will appear from the two following instances collected among others by Lord Lyttleton, Hist. Hen. II. 2 vol. 296. "John Earl of Lincoln gave Henry the Third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matilda, his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honourable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." (Co. Litt. 88, n. 11.) One cannot read this without astonishment, that such should have continued to be the condition of this country till the year 1660, which, from the extermination of these

6. Fines on alienation.

6. Another attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connexion; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feudal obligation was considered as reciprocal, the lord also could not alienate [72] his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when everything came in process of time to be bought and sold, the lords would not grant a licence to their tenant, to alien, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly-purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to alien without a licence: but as to common persons, they were at liberty, by *Magna Charta*, and the statute of *Quia Emptores*, 18 Edw. I., c. 1 (if not earlier), to alien the whole of their estate, to be holden of the same lord as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not alien without a licence: for if they did, it was in ancient strictness an absolute forfeiture of the land;[p] though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III., c. 12, which ordained, that, in such case, the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a licence of alienation; but if the tenant presumed to alien without a licence, a full year's value should be paid.[q]

Attornment.

7. Escheat.

7. The last consequence of tenure in chivalry was *escheat;*

feudal oppressions, ought to be regarded as a memorable æra in the history of our law and liberty.—[CHRISTIAN.]

[p] 2 Inst. 66.

[q] 2 Inst. 67.

which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was by the feudal law entirely blotted out and abolished. [73] In such cases the land escheated or fell back to the lord of the fee;[r] that is, the tenure was determined by breach of the original condition expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.[s]

These were the principal qualities, fruits, and consequences of the tenure by knight-service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the seventeenth century; and which was created, as Sir Edward Coke expressly testifies,[t] for a military purpose, viz., for defence of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Grand serjeanty. Such was the tenure by *grand serjeanty, per magnum servitium,* whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other

[r] Co. Litt. 13. [s] Feud. l. 2, t. 86. [t] 4 Inst. 192.

officer, at his coronation.[u] It was in most other respects like knight-service;[v] only he was not bound to pay aid,[w] or escuage;[x] and, when tenant by knight-service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little.[y] Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty.[z]

[74]

Cornage.

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti: scutum* being then a well-known denomination for money: and in like manner it was called, in our Norman French, *escuage*, being indeed a pecuniary, instead of a military, service.[a] The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments, in the time of Hen. II., seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and King John was obliged to consent by his *Magna Charta*, that no scutage should be imposed without consent of parliament. But this clause was omitted in his son Henry III.'s charter, where we only find that scutages or escuage

Escuage.

[75]

u Litt. § 153.
v Litt § 158.
w 2 Inst. 233.
x Litt. § 158.
y Litt. § 154.
z Litt. § 156.
a Littleton and others explain *Scutage* to mean a payment made in lieu of actual service with the *scutum*, or shield.

should be taken as they were used to be taken in the time of Henry II.: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I., c. 5 & 6, and many subsequent statutes, it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament;[b] such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton[c] must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected[d] as a tenure in chivalry.[e] But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure instead of knight-service, would have then been of another kind, called socage,[f] of which we shall speak in the next chapter.

Corruption of military tenures by escuage.

For the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of [76] tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burdens, which (in consequence of the fiction adopted after the conquest) were introduced and

[b] Old Ten. tit. *Escuage.*
[c] § 103.
[d] Wright, 122.
[e] *Pro feudo militari reputatur.* Flet. l. 2, c. 14, § 7.
[f] Litt. § 97, 120.

laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which however were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin;* and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith[g] very feelingly complains, "when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren," to reduce him still farther, he was yet to pay half-a-year's profits as a fine for suing out his *livery;* and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* of *alienation*.

Hardships of military tenure.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length King James I. consented, in consideration of a proper equivalent, to abolish them all; though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland, which was afterwards effected by the statute 20 Geo. II., c. 43.[h] King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the Crown and other lords would

[77]

[g] Commonw. l. 3, c. 5.

[h] 4 Inst. 202.

sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the Crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having during the usurpation been discontinued), were destroyed at one blow by the statute 12 Car. II., c. 24, which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches.[1]

Abolition of military tenures.

[1] See Hallam Const. Hist. vol. ii. ch. 11.

CHAPTER VI.

OF THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since, by the statute 12 Car. II., the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll, were reserved; nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feudal origin as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone to which we can recur, to explain any seeming or real difficulties, that may arise in our present mode of tenure. [78]

The military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage,* consisted also of free and honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species [79] of tenure. And to this we are next to proceed.

II. Socage tenure.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton: if a man holds by a rent in money, without any escuage or

serjeanty, "*id tenementum dici potest socagium:*" but if you add thereto any royal service, or escuage, to any, the smallest, amount, "*illud dici poterit feodum militare.*" So, too, the author of Fleta: "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium.*" Littleton also defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch, a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20*s.* rent; or by homage, fealty, and 20*s.* rent; or by homage and fealty without rent; or by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only without any other service: for all these are tenures in socage.[a]

Two kinds of socage.

But socage, as was hinted in the last chapter, is of two sorts; *free*-socage, where the services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil,[b] and other subsequent authors, by the name of *liberi sokemanni,* or tenants in free-socage.

Free socage.

Of this tenure we are first to speak; and this both in the [80] nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of the word;[c] who derives it from the Saxon appellation *soc,* which signifies liberty or privilege, and, being joined to a usual termination, is called *socage,* in Latin, *socagium;* signifying thereby a free or privileged tenure. This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca,* an old Latin word, denoting (as they tell us) a plough: because in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that, in process of time, this service was changed into an

[a] Litt. § 117, 118, 119. [b] L. 3, c. 7. [c] Gavelk. 138.

annual rent by consent of all parties, and that, in memory of its origin, it still retains the name of socage or plough-service.[d] Yet this by no means agrees with what Littleton himself tells us,[e] that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and origin (as escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty, changed both their name and nature, and were called socage.[f] It was the *certainty* therefore that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme*,[g] tells us, that they are "lands and tenements, whereof the nature of the fee is changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief, can be demanded." Which [81] leads us also to another observation, that if socage tenures were of such base and servile origin, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II., a point of the utmost importance and value to the tenants, to reduce the tenures by knight-service to *fraunk ferme*, or tenure by socage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.

Socage of Saxon origin.

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the Crown, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burdensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure;[h] the preservation whereof inviolate from

[d] Litt. § 119. [e] Litt. § 118. [f] Litt. § 98, 120.
[g] C. 66. [h] Wright, 211.

the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

We may remember that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it: for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c., at the coronation) are still reserved. Now

Petit serjeanty.

petit serjeanty bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the person

[82]

of the sovereign. Petit serjeanty, as defined by Littleton,[i] consists in holding lands of the sovereign by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says,[j] is but socage in effect; for it is no personal service, but a certain rent: and we may add, it is clearly no predial service, or service of the plough, but in all respects *liberum et commune socagium*: only being held of the sovereign, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *Magna Charta* respected it in this light, when it enacted, that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty.[k]

Burgage tenure.

Tenure in *burgage* is described by Glanvil,[l] and is expressly said by Littleton, to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain.[m] It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other

[i] Litt. § 159.

[j] Litt. § 160.

[k] The Duke of Marlborough and the Duke of Wellington hold the estates granted to their ancestors for their public services, by the tenure of petit serjeanty, and by the annual render of a small flag.

[l] Lib. 7, cap. 3.

[m] Litt. § 162, 163.

towns by the right of sending members to parliament; and, where the right of 'voting in respect of burgage tenements exists,' that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarcely have amounted to a knight's fee. Besides, the owners of them being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-service; since the tenants must have been citizens or burghers, the [83] situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage; the principal and most remarkable of which is that called *Borough English*; so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil and by Littleton; viz., that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father.[n] For which Littleton gives this reason: because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it

Borough English.

[n] Litt. ss 165, 211. Co. Litt. 110 b. 1 T. R. 466.

certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III.[o] And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became his heir.[p] So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at the common law: and that, in others, a man may dispose of his tenements by will, which, in general was not permitted after the conquest till the reign of Henry the Eighth; though in the Saxon times it was allowable.[q] A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

[84]

Special customs.

Gavelkind.

The nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom,[r]) we may fairly conclude that this was a part of those liberties; agreeably to the opinion of Selden, that gavelkind before the Norman conquest was the general custom of the realm.[s] The distinguishing properties of this

[o] Seld. Tit. of Hon. 2, 1, 47, n. 188, f. 995. Reg. Mag. l. 4, c. 31.

[p] *Pater cunctos filios adultos a se pellebat, praeter unum quem haeredem sui juris relinquebat.* (Walsingh. Upodigm. Neustr. c. 1.)

[q] Wright, 172.

[r] Stat. 32 Hen. VIII. c. 29. Kitch. of Courts, 200.

[s] Analect. l. 2, c. 7.

tenure are various; some of the principal are these: 1. The tenant is of age sufficient to alien his estate by feoffment at the age of fifteen.[t] 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bough, the son to the plough."[u] 3. In most places he had a power of devising lands by will, before the statute for that purpose was made.[v] 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together;[w] which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed.[x] These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain.[y] Wherefore, by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII. c. 3, for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage.*[z] Now the immunities which the tenants in gavelkind enjoyed were such as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage are in general of a nobler origin than is assigned by Littleton, and after him by the bulk of our common lawyers.[a]

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[t] Lamb. Peramb. 614.

[u] Lamb. 634.

[v] F. N. B. 198. Cro. Car. 561.

[w] Litt. § 210. The gavelkind descent of lands in Ireland was incident to the custom of *tanistry*, which was destroyed by a solemn judgment in the reign of James I. (Dav. Rep. 28.) In the reign of Queen Anne, in order to weaken the Roman Catholic interest, an Irish statute was passed to make the lands of papists descendible according to the custom of gavelkind, unless the heir conformed within a limited time. (Rob. Gav. 17.) This statute was, however, repealed by 17 & 18 Geo. III. c. 49, s. 1. (Co. Litt. 176 a.)

[x] Glanv. l. 7, c. 3. The *tenure* of gavelkind must not be confounded with the *custom* of a descent in the manner of gavelkind. The latter exists in respect of copyhold lands in various manors; but is unattended by the other incidents of gavelkind. (*Robinson on Gavelkind.*)

[y] Wright, 211.

[z] Spelm. Cod. Vet. Leg. 355.

[a] 'Private acts are occasionally obtained for disgavelling lands, after which the descent therein is according to the ordinary rule of succession.'

Feudal nature of socage.

Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon origin; since (as was before observed) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificance: since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large: [86] till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton, their number and value began to swell so far, as to make a distinct, and justly-envied, part of our English system of tenures.

However this may be, the tokens of their feudal origin will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. Held of lords.

1. In the first place, then, both were held of superior lords; of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant.

2. Subject to rents.

2. Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from the supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day.

3. Fealty.

3. Both were, from their constitution, universally subject

(over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant.[b]

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter:[c] which were fixed by the statute Westm. 1, c. 36, at 20*s*. for every 20*l*. *per annum* so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12 Car. II.

4. Aids.

[87]

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l*., or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small:[d] and therefore Bracton (L. 2, c. 37, s. 8) will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini.* So too the statute 28 Edw. I. c. 1, declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due even though the heir was under age, because the lord had no wardship over him.[e] The statute of Charles II. reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant.[f]

5. Relief.

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service.[g] But the consequences of tenancy *in capite* are, among the other feudal burdens, entirely abolished by the statute.

6. Primer seisin.

7. Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under

7. Wardship.

Litt. §§ 117, 130, 131.
Co. Litt. 91.
Litt. § 126.
[e] Litt. § 127.
[f] 3 Lev. 145.
[g] Co. Litt. 77.

fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because, in this tenure, no [88] military or other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the first book of these Commentaries. At fourteen this wardship in socage ceases; and the heir may oust the guardian, and call him to account for the rents and profits:[h] for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II. c. 24, enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the Court of Chancery will interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage.

8. Marriage, or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage.[i] For, the law in favour of infants is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but also for what they *might*, receive on [89] the infant's behalf; lest by some collusion the guardian

[h] Litt. § 123. Co. Litt. 89.

[i] Litt. § 123.

should have received the value, and not brought it to account: but the statute having destroyed all values of marriages, this doctrine of course has ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the Act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of King Edward's laws, that were restored by Henry the First's charter, as might alone convince us that socage was of a higher origin than the Norman conquest.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and Sir Edward Coke's comment on them,[j] speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are abolished by the statute of Charles the Second.

9. Fines for alienation.

10. Escheats are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs.[k]

10. Escheats.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the Restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common socage.

The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure; and this (we may remember) he subdivides into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures.

[90]

III. From the tenure of pure villenage have sprung our present *copyhold* tenures, or tenure by copy of court-roll at the will of the lord: in order to obtain a clear idea of which

III. Copyholds.

[j] 1 Inst. 43. 2 Inst. 65, 66, 67.

[k] Wright, 210.

it will be previously necessary to take a short view of the origin and nature of manors.

Manors.

Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day: just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest. A manor, *manerium, a manendo*, because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales*, or *demesne* lands; being occupied by the lord, or *dominus manerii*, and his servants. The other, or *tenemental*, lands they distributed among their tenants: which, from the different modes of tenure, were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from free-socage lands: and from hence have arisen most of the freehold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors within the manor; and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost, 'although it may continue to have a certain kind of existence as a manor by reputation, for all purposes affecting the title and tenure of the copyholders.'[1]

Book-land.

Folk-land.

[91]

[1] Co. Litt. 58 a., 117 b.; 4 T. R. 446.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the Crown, granted out frequently smaller manors to inferior persons to be holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignory is frequently termed an honour, not a manor, especially if it has belonged to an ancient feudal baron, or has been at any time in the hands of the Crown. In imitation whereof these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *Magna Charta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of King John), that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards, the statute of Westm. 3, or *Quia Emptores*, 18 Edw. I. c. 1, which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II. c. 6, and of 34 Edw. III. c. 15, by which last all subinfeudations, previous to the reign of King Edward I., were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day must have existed as early as King Edward the First: for it is essential to a manor, that there be tenants who hold of the lord; and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a

Honours.

Subinfeudation.

Statute of Quia Emptores.

[92]

No new manor since 19 Edw. I.

common lord since the statute of *Quia Emptores*, could create any new tenants to hold of himself.

Folk-land.

Now, with regard to the folk-land, or estates held in villenage, this was a species of tenure neither strictly feudal, Norman, or Saxon; but mixed and compounded of them all:[m] and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple says,[n] a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable, that they, who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition.[o] This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as Sir Edward Coke tells us, *a villa;* because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helots*, to whom alone the culture of the land was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

Villenage.

[93]

Villeins regardant and in gross.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another.[p] They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess

[m] Wright, 215.
[n] Introd. Hist. Engl. 59.
[o] Wright, 217.
[p] Litt. § 181.

them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices:[q] and their services were not only base, but uncertain both as to their time and quantity.[r] A villein, in short, was in much the same state with us, as Lord Molesworth[s] describes to be that of the boors in Denmark, and which Stiernhook[t] attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity.

In many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord: and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property. For the children of villeins were also in the same state of bondage with their [94] parents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*. In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius*: and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it. The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill or maim his villein; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of the villein's ancestor. The villein had an action for the maim of his own person, 'but the damages might be immediately seized by the lord; who, however, might be indicted on the

Nativi.

Neifes.

[q] Litt. § 172.
[r] Bracton, l. 4, tr. 1, c. 28, § 5.
[s] C. 8.
[t] De Jure Sueonum, l. 2, c. 4.

king's behalf.' Neifes, however, had an appeal of rape, in case the lord violated them by force.

Manumission of villeins.

Villeins might be enfranchised by manumission, which was either express or implied: express, as where a man granted to the villein a deed of manumission: implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years; for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him; for, as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favour of liberty, presumed that by bringing this action he meant to set his villein on the same [95] footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein without calling in the assistance of the law.

Copyholders originally villeins.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts-baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants

had nothing to show for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold.*

Thus copyhold tenures, as Sir Edward Coke observes, although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will. Which affords a very [96] substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates, and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation.[u] For Sir Thomas Smith[v] testifies, that in all his time (and he was secretary to Edward VI.) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, had in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was, for one Christian man to hold another in bondage: so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs, for they also had a scruple in conscience to impoverish and despoil the church so much, as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into

[u] For the old law as to villenage, *see* Littleton, ss. 186–208. Co. Litt. 140. The last claim of villenage recorded in our courts, was in the 15 Jac. I. (*Pigg* v. *Caley*, Noy, 27; 11 Harg. St. Tr. 342.)—[CHRISTIAN.] See also Barrington on the Statutes, 30*l*.

[v] Commonwealth, b. 3, c. 10.

copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit-rent.[w]

[97] As a farther consequence of what has been premised, we may collect these two main principles, which are held to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

Rules of copyhold tenure.

Copyholds of inheritance and for life.

In some manors, where the custom has been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

The fruits and appendages of a copyhold tenure, that it has in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, are a render of the best beast or other chattel (as the custom may be) to the lord on the death of the tenant. This is plainly a relict of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's

Heriots.

[w] In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, and the like; the lord usually finding them meat and drink, and sometimes a minstrel or piper for their diversion. (Rot. Maner. de Edgware Com. Mid.)

lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian, who usually assigns some relation of the infant tenant to act in his stead; and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent: otherwise they might amount to a disherison of the estate. No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate.[x] From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) has always shown to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.

Wardship.

[98]

Fines.

Thus much for the ancient tenure of *pure* villenage and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villenage, and sometimes of *villein-socage*. This, he tells us, is such as has been held of the kings of England from the conquest downwards; that the tenants herein, "*villana faciunt servitia*,

IV. Villein-socage.

[99]

x 2 Ch. Rep. 134.

sed certa et determinata;" that they cannot alien or transfer their tenements by grant or feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstance we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *ancient demesne;* to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium.*

Ancient demesne.

Ancient demesne consists of those lands or manors, which though now perhaps granted out to private subjects, were actually in the hands of the Crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great survey in the Exchequer called Domesday Book. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton (c. 66) testifies, continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points. Others were in great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein service, but those determinate and certain; as to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which were soon changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them; as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of *right close;* not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries; and the like.[y]

[100] These tenants, therefore, though their *tenure* be absolutely copyhold, yet have an *interest* equivalent to a freehold: for notwithstanding their services were of a base and villenous origin,[z] yet the tenants were esteemed in all other respects

[y] 4 Inst. 269. F. N. B. 11, 13, 14, 16.

[z] Gilb. Hist. of Exch. 16 and 30.

to be highly-privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*," says Bracton, "*dicuntur liberi.*" Britton also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries;* which he describes to be "lands and tenements, which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being, as it were, lands enfranchised by the king or his predecessors from their ancient demesne." And the same name is also given them in Fleta. Hence Fitzherbert observes, that no lands are ancient demesne, but lands holden in socage: that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same origin; for want of distinguishing, with Bracton, between free socage or socage of frank-tenure, and villein-socage or socage of ancient demesne.

Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton, and remaining to this day, viz., that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds, or [101] by deed of bargain and sale followed by admittance: yet with this distinction, that, in the surrender of these lands in ancient demesne, it is not usual to say "*to hold at the will of the lord*" in their copies, but only, "*to hold according to the custom of the manor.*"[a]

[a] 'There are three sorts of tenants in ancient demesne; one, who hold their lands freely by the grant of the king; a second who hold of a manor, which is ancient demesne, but not at the will of the lord, and whose estates pass by surrender, or deed of grant, or bargain and sale, and admittance, and who are denominated customary freeholders, and this is the class of tenants de-

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon æra to the 12 Car. II., all lay tenures are now in effect reduced to two species: *free* tenure in common socage, and *base* tenure by copy of court-roll.[b]

I mentioned *lay* tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II., which is of a *spiritual* nature, and called the tenure in frankalmoign.

V. Frankalmoign.

V. Tenure in *frankalmoign, in libera eleemosyna*, or free alms, is that whereby a religious corporation, aggregate or sole, holds lands of the donor to them and their successors for ever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature.[c] This is the tenure, by

scribed in the text; a third class are those who hold of a manor, which is ancient demesne, by copy of court-roll, at the will of the lord, and who are copyholders of base tenure. It will be observed that customary freeholders are found in other manors besides those of ancient demesne. Such tenants are frequent in the northern counties of England, and are almost peculiar thereto, though occasionally found elsewhere. Their estates are known by the denomination of *tenant-right*, they are not holden at the will of the lord, and are alienable by deed and admittance thereon. The freehold, however, is in the lord.' (*Reay* v. *Huntington*, 4 East. 271, and Scriven on Copyh. 572, 582.)

[b] 'Attempts have been made by several recent Acts, to provide means of converting copyhold into freehold tenures. This is a process easily effected in most cases, without the assistance of an Act of Parliament, provided landlord and tenant can be brought to agree as to the value of the interest which is given up. The last Act passed on this subject, 15 & 16 Vict. c. 51, has enabled either landlord or tenant to compel the other to join in effecting a commutation of the tenure. But the expenses of commutation being thrown upon the person requiring it, the privilege is still but sparingly used, and the statute has hitherto been principally useful in effecting commutations in manors of which ecclesiastical bodies are the lords. On this subject of copyhold enfranchisement, see further pp. 146, 147.

[c] Litt. §§ 131–135.

which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day;[d] the nature of the service being upon the Reformation altered, and made conformable to the purer doctrines of the Church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions:[e] just as the Druids, among the ancient Britons, had *omnium rerum immunitatem*.[f] And even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden: but merely a complaint to the ordinary or visitor to correct it. Wherein it materially differs from what was called *tenure by divine service:* in which the tenants were obliged to do some special divine services in certain; as, to sing so many masses, to distribute such a sum in alms, and the like; which being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor. All such donations are indeed now out of use: for since the statute of *Quia Emptores*, 18 Edw. I., none but the sovereign can give lands to be holden by this tenure. So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II., and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.[g]

[102]

[d] Bracton, l. 4, tr. 1, c. 28, s. 1.
[e] Seld. Jan. 1, 42.
[f] Cæsar de Bell. Gall. l. 6, c. 13.
[g] Litt. §§ 136-140.

CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE.

[103] THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements, and hereditaments signifies such interest as the tenant has therein; so that, if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby.[a] It is called in Latin *status;* it signifying the condition or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and thirdly, with regard to the *number* and *connexions* of the tenants.

1. Quantity of interest.

First, with regard to the *quantity of interest* which the tenant has in the tenement: this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of [104] estates into such as are *freehold*, and such as are *less than freehold.*

Freeholds.

An estate of freehold, *liberum tenementum,* or frank-tenement, is defined by Britton to be "the *possession* of the soil by a freeman." And St. Germyn[b] tells us, that "the possession of the land is called in the law of England the frank-tenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking,

[a] Co. Litt. 345.

[b] Dr. & Stud. b. 2, d. 22.

freehold: which actual possession '(previous to the statute 8 & 9 Vict. c. 106) could by the course of the common law' only be given by the ceremony called livery of seisin, which is the same as the feudal investiture. 'Formerly therefore a *freehold* was described to be' such an estate in lands as was conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what was equivalent thereto. And accordingly it is laid down by Littleton,[c] that, where a freehold shall pass, it behoveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.[d]

Estates of freehold (thus understood) are either estates *of inheritance*, or estates *not of inheritance.* The former are again divided into inheritances *absolute* or fee-simple; and inheritances *limited,* one species of which we usually call fee-tail.

Tenant in fee-simple.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever:[e] generally absolutely and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee *(feodum)* is the same with that of feud or fief, and, in its original sense, it is taken in contradistinction to *allodium*; which latter the writers on [105] this subject define to be every man's own land, which he possesses merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof has *absolutum et directum dominium,* and therefore is said to be seised thereof absolutely *in dominico suo,* in his own demesne. But *feodum,* or fee, is that which is held of some superior on condition of rendering him service; in which superior the ultimate property of the land

[c] Litt. § 59.

[d] The statute 8 & 9 Vict. c. 106, above referred to, without abolishing the ceremony of livery of seisin, has, as we shall see afterwards, rendered it no longer necessary for the conveyance of freeholds in possession, and such estates may now be transferred by a simple deed of grant.

[e] Litt. § 1.

resides. And, therefore, Sir Henry Spelman[f] defines a feud or fee to be the right which the vassal or tenant has in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *property* of the soil always remaining in the lord. This allodial property no subject in England has; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the Crown. The sovereign, therefore, only has *absolutum et directum dominium:* but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration, for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject, therefore, has only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it, he has *dominium utile,* but not *dominium directum.*[g] And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: "he is seised thereof *in his demesne as of fee.*" It is a man's demesne, *dominicum,* or property, since it belongs to him and his heirs for ever: yet this *dominicum,* property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, *as of fee:* that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

[106] This is the primary sense and acceptation of the word *fee.* But (as Sir Martin Wright very justly observes)[h] the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee,* therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of

Fee.

[f] Of Feuds, c. 1. [g] Co. Litt. 1. [h] Of Ten. 148.

simple annexed to it (as a fee or a fee-simple), it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the sovereign said to be seised in fee, he being the feudatory of no man.

Corporeal and incorporeal.

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense, as an estate of inheritance, it is applicable to, and may be had in, any kind of hereditaments, either corporeal or incorporeal.[i] But there is this distinction between the two species of hereditaments; that, of a corporeal inheritance, a man shall be said to be seised *in his demesne as of fee:* of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne. For as incorporeal hereditaments are in their nature collateral to, and issue out of lands and houses, their owner has no property, *dominicum*, or demesne, in the *thing* itself, but has only something, derived out of it, resembling the *servitutes*, or services, of the civil law.[j] The *dominicum* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee.*

[107]

Vested fee.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple.

Fee in abeyance.

Yet sometimes the fee may be in *abeyance*, that is (as the word signifies) in expectation, remembrance, and contemplation of law; there being no person in *esse*, in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. This is the case of a parson of a church, who has

[i] *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive reditus, &c* (Flet. l. 5, c. 5, § 7.)

[j] *Servitus est jus, quo res mea alterius rei vel personæ servit.* Ff. 8, l. 1.

only an estate therein for the term of his life; and the inheritance remains in abeyance. And not only the fee, but the freehold also, may be in abeyance; as when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor.[k] 'But the law will not admit an abeyance except in cases of necessity. Hence if there be a grant or devise' to John for life, and afterwards to the heirs of Richard, although the inheritance is plainly neither given to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis*, 'yet shall not the fee be said to be in abeyance; but it remains vested in the grantor or his heirs, or in the heirs of the testator, until the contingency happens which shall vest it elsewhere, namely, the death of John, living the heirs of Richard, that is necessarily after Richard's death.'[l]

The word "heirs" necessary in grant of fee-simple;

The word "heirs" is necessary in the grant or donation, in order to make a fee, or inheritance. For, if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life.[m] This very great nicety about the insertion of the word "heirs" in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which, we may remember, it was [108] required that the form of the donation should be punctually pursued; or that, as Craig[n] expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donâsse præsumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no

[k] Litt. ss. 646, 647. Mr. Fearne having, in his work on Contingent Remainders, attacked the doctrine of abeyance, it may be observed, with respect to the instances given in the text, that there hardly seems any necessity to resort to abeyance, in order to explain the residence of the inheritance, or of the freehold. In the first case, the whole fee-simple is conveyed to a sole corporation, the parson and his successors; but if any interest is not conveyed, it still remains, in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. And in the second case, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for, after induction, he can recover all the rights of the church, which accrued from the death of the predecessor.—[CHRISTIAN.] 6 Cl. & Fin. 850.

[l] Fearne, Cont. Rem. chap. 6.

[m] Litt. § 1. 2 W. Bl. 1185.

[n] L. 1, t. 9, § 17.

longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions.[o]

For, 1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigour was wearing out apace, a more liberal construction has always been allowed; and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee was considered to have an estate of inheritance; the intention of the devisor being sufficiently plain from the words of perpetuity annexed, though he had omitted the legal words of inheritance. 'This freedom of construction is in this instance made unnecessary by positive enactment, for by the statute 1 Vict. c. 26 where any real estate is devised (in a will made on or after Jan. 1, 1838) to any person *without any words of limitation*, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of, unless a contrary intention shall appear by the will.' 2. Neither did the rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passed by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed.[p] 3. In creations of nobility by writ, the peer so created has an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided: but, in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for, as heirs take from the ancestor, so does the successor from the predecessor. Nay, in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*, the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini;* and in all these cases, a fee-simple vests in such sole

Not in devise by will.

Nor in fines and recoveries.

Creations of nobility by writ.

Grants to corporations.

[109]

[o] Co. Litt. 9, 10.

[p] Co. Litt. 9.

corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one. 5. Lastly, in the case of the sovereign, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

Grants to the king.

II. Limited fees.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1. *Qualified,* or *base* fees; and 2. Fees *conditional,* so called at the common law; and afterwards fees-*tail,* in consequence of the statute *De Donis.*

1. Base fee.

1. A base, or qualified, fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here, John Talbot had a base or qualified fee in that dignity,[q] and the instant he or his heirs quitted [110] the seignory of this manor, the dignity was at an end. This estate is a fee, because by possibility it may endure for ever in a man and his heirs: yet, as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee.[r]

[q] Co. Litt. 27.

[r] The term *base fee* is now most commonly applied to that species of estate which is created when an estate-tail is converted into a qualified fee by an assurance, which though it may bar the issue of the tenant in tail, does not bar the remainder-men. Such an estate is a fee descendible to heirs general, but liable to determine upon failure of issue of the original tenant-in-tail. (3 & 4 Will. IV. c. 74.)

2. Conditional fee.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata;*[s] *sicut certis hæredibus, quibusdam a successione exclusis:*" as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body*, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that, if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.[t] Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws.[u]

Reversion to the donor.

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now, we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, and wholly unconditional. So that as soon as the grantee [111] had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least for these three purposes: 1. To enable the tenant to alien the land, and thereby to bar not only his own issue, but also

Conditional fee may become absolute.

[s] Flet. l. 3, c 3, § 5.

[t] Plowd. 241.

[u] Ælfred's Dooms. 41. *The man who has 'boc-land,' and which his kindred left him, then ordain we that he must not give it from his 'maegburg,'* [kindred, family,] *if there be writing or witness that it was forbidden by those men who at first acquired it, and by those who gave it to him, that he should do so; and then let that be declared in presence of the king and of the bishop, before his kinsmen.* (Thorpe's Ancient Laws and Institutes of England, p. 89.)

the donor of his interest in the reversion.[v] 2. To subject him to forfeit it for treason; which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated.[w] 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue.[x] And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact alien the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation, the land, by the terms of the donation, could descend to none but the heirs *of his body*, and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to alien as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: which things, says Sir Edward Coke,[y] though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such-like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

[112] The inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in

[v] Co. Litt. 19. 2 Inst. 233.
[w] Co. Litt. 19. 2 Inst. 234.
[x] Co. Litt. 19.
[y] 1 Inst. 19.

their own families, to put a stop to this practice, procured the statute of Westminster the second[z] (commonly called the statute *de donis conditionalibus*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Statute De Donis.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail;*[a] and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us,[b] that tenant in fee-tail is by virtue of the statute of Westminster the second.

Fee-tail.

Having thus shown the *origin* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed under the statute *De Donis. Tenements* is the only word used in the statute: and this Sir Edward Coke[c] expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments, which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities which concern lands, or have relation to fixed and certain places, may be entailed.[d] But mere personal chattels, which savour not at all of the realty, cannot be

What things may be entailed.

[113]

Personal chattels not entailable;

[z] 1 Inst. 19.

[a] The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists (see Craig, l. 1, t. 10, § 24, 25), among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off; being derived from the barbarous verb *taliare*, to cut, from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. Gloss. 531.)

[b] Litt. § 13.

[c] 1 Inst. 19, 20.

[d] 7 Rep. 33.

entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee has still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner.[e] An estate to a man and his heirs for another's life cannot be entailed:[f] for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis*.[g] Neither can a copyhold estate be entailed by virtue of the *statute;* for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body;[h] for here the custom ascertains and interprets the lord's will.

nor estates pur auter vie.

Tail-general or special.

Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general* or *special.* Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten:* which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni.*[i] Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways.[j] I shall instance in only one; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten:* here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee: but they being heirs *to be by him begotten,* this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten (viz. *Mary, his present wife*), this makes it a fee-tail special.

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Estates, in general and special tail, are farther diversified

[e] Co. Litt. 19, 20.
[f] 2 Vern. 225. 3 P. Wms. 262.
[g] 3 P. Wms. 262.
[h] 3 Rep. 8.
[i] Litt. §§ 14, 15.
[j] Litt. §§ 16, 26, 27, 28, 29.

by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As, if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail-male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *e converso*, the heirs male, in case of a gift in tail female. Thus, if the donee in tail-male has a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male.[k] And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And, therefore, if a man has two estates-tail, the one in tail-male, the other in tail-female; and he has issue a daughter, which daughter has issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent wholly either in the male or female line.[l]

Tail male or female.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring;* all these are only estates for life, there wanting the words of inheritance, his heirs.[m] So, on the other hand, a gift to a man, and his *heirs male* or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue.[n] In last wills and testaments, however, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male;* or by other irregular modes of expression.[o]

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Words of inheritance necessary.

Words of procreation necessary.

[k] Litt. §§ 21, 22, 24.

[l] Co. Litt. 25.

[m] Co. Litt. 20. 2 W. Bl. 728.

[n] Litt. § 31. Co. Litt. 27.

[o] Co. Litt. 9. 27. Or to a man and his children, if he has no children at the time of the devise (6 Co. 17); or to a man and his posterity (1 H. Bl.

Frankmarriage.

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio,* or *frankmarriage.* These are defined to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now, by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage,* does *ex vi termini* not only create an inheritance, like the word *frankalmoign,* but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee.[p]

Incidents to estates-tail.

The *incidents* to a tenancy-in-tail, under the statute Westm. 2, are chiefly these:[q] 1. That a tenant-in-tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of the tenant-in-tail shall have her *dower,* or thirds, of the estate-tail. 3. That the husband of a female tenant-in-tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate-tail may be *barred* or destroyed. 'This was formerly effected by a fine, by a common recovery, or by lineal warranty, descending with assets to the heir; and may now be so by a deed executed in conformity with the statute 3 & 4 Will. IV. c. 74, which abolished fines and recoveries, and put an end to the effect of warranties.' All which will hereafter be explained at large.

Waste. [116] Dower. Curtesy. Barrable.

Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott),[r] occasioned infinite difficulties and disputes.[s] Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants-in-tail; for, if

447); or by any other words, which show an intention to restrain the inheritance to the descendants of the devisee.—[CHRISTIAN.]

[p] Litt. §§ 17, 19, 20.

[q] Co. Litt. 224.

[r] Com. Recov. 5.

[s] 1 Rep. 131.

such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant-in-tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm.[t] But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature, and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

Recoveries.

About two hundred years intervened between the making of the statute *De Donis*, and the application of common recoveries to this intent in the twelfth year of Edward IV., which were then openly declared by the judges to be a sufficient bar of an estate-tail.[u] For though the courts had, so long before as the reign of Edward III., very frequently hinted their opinion that a bar might be effected upon these principles,[v] yet it never was carried into execution, till Edward IV., observing[w] (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court:[x] wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant-in-tail should be an effectual destruction thereof. What common recoveries were, both in their nature and consequences, and why they were allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. 'For although this mode of assurance, as before mentioned, has been abolished, yet a know-

[117]

[t] Co. Litt. 19. Moor, 156. 10 Rep. 38.

[u] 1 Rep. 131 6 Rep. 40.

[v] 10 Rep. 37, 38.

[w] Pigott, 8.

[x] Year-book, 12 Edw. IV. 14, 19.

ledge of the learning relating to it is still of importance in all inquiries as to the titles of lands.' At present it need only be said, that they were fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *De Donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and that these recoveries, however clandestinely introduced, became by long use and acquiescence a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which the tenant-in-tail might dispose of his lands and tenements; so that no court would suffer them to be shaken or reflected on, and even Acts of Parliament by a side-wind countenanced and established them.

Forfeiture for treason.

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeiture for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently re- [118] settled in a similar manner, to suit the convenience of families, had address enough to procure a statute,[y] whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

Barred by fine.

The next attack which they suffered in order of time was by the statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants-in-tail, which did not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue-in-tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines,[z] by the statute 32 Hen. VIII. c. 36, which declared a fine duly levied by tenant-in-tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII., whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in

[y] 26 Hen. VIII. c. 13. [z] 4 Hen. VII. c. 24.

order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *De Donis* had expressly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII., when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the Crown from any danger of infringement, all estates-tail created by the Crown, and of which the Crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20, which enacted, that no feigned recovery had against tenants-in-tail, where the estate was created by the Crown,[a] and the remainder or reversion continued still in the Crown, should be of any force and effect. Which was allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative was not concerned. 'But Crown reversions may now, with few exceptions, be barred under the statute abolishing fines and recoveries.'[b] [119]

Lastly, by a statute of the succeeding year,[c] all estates-tail were rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws,[d] they are also subjected to be sold for the debts contracted by a bankrupt; 'and now, by statute 1 & 2 Vict. c. 110, they are chargeable by judgment or decree of a court of law or equity in favour of creditors, to the exclusion of the issue and remainder-men to the same extent as the debtor himself might have charged them. I may add, that' by the construction put on the statute 43 Eliz. c. 4, an appointment[e] by tenant-in-tail of the lands

[a] Co. Litt. 372.

[b] 3 & 4 Will. IV. c. 74; *Perkins* v. *Sewell*, 4 Burr. 2223; *D. of Grafton* v. *L. and B. Railway Co.*, 6 Scott, 719; *Davis* v. *D. of Marlborough*, 1 Swanst. 74.

[c] 33 Hen. VIII. c. 39, § 75.

[d] Stat. 21 Jas. I. c. 19; 3 & 4 Will. IV. c. 74, s. 55; and 12 & 13 Vict. c. 106, s. 208.

[e] 2 Vern. 453. Chan. Prec. 16.

entailed, to a charitable use, was good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For first, the tenant-in-tail is now enabled to alien his lands and tenements, 'or to enlarge his interest therein to a fee-simple,' and to defeat the interest as well of his own issue, though unborn, as also of the reversioner, even in the case of the Crown '(except in some particular instances):' secondly, he is now liable to forfeit them for high treason: and, lastly, he may charge them with reasonable leases, and 'they may become chargeable with his debts as extensively as though he held them in fee-simple.'

CHAPTER VIII.

OF FREEHOLDS, NOT OF INHERITANCE.

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WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the acts of the parties; others merely *legal*, or created by construction and operation of law.[a] We will consider them both in their order.

I. Created by deed or grant

I. Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur auter vie.*[b] These estates for life are, like inheritances, of a feudal nature; and were, for some time, the highest estate that any man could have in a feud which (as we have before seen)[c] was not in its origin hereditary. They are given or conferred in the same manner and with the same formalities as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

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General grant.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A. B. the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for

Wright, 190.   [b] Litt. § 56.

life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee;* in case the grantor has authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, except in the case of the Crown.[c]

Determinable upon contingency.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.[d] Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as 'when a man by Act of Parliament or judgment of law is attainted of felony,' whereby he is dead in law:[e] for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death.

[122]

The *incidents* to an estate for life are principally the following, which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law.

1. Estovers.

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him *reasonable estovers* or *botes.*[f] For he has a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premises: for the destruction of such things as are not the temporary profits of the

[c] Co. Litt. 36, 42.
[d] Co. Litt. 42. 3 Rep. 20.
[e] 2 Rep. 48.
[f] Co. Litt. 41.

tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.

2. Emblements.

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain.[g] Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore, by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole.[h] From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the *act of law*. Therefore, if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law.[i] But if an estate for life be determined by the tenant's *own act* (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the

[123]

[g] Co. Litt. 55.   [h] Feud. l. 2, t. 28.   [i] 5 Rep. 116.

emblements.[j] The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profits, but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent, or natural profit of the earth.[k] For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. Under-tenants' rights.

3. A third incident to estates for life relates to the under-tenants, or lessees. For they have the same, nay greater indulgences than their lessors, the original tenants for life. [124] The same; for the law of estovers and emblements with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place:[l] and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate;* her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her,[m] 'and now by stat. 14 & 15 Vict. c. 25, on the determination of leases or tenancies under landlords holding as tenants for life or for an uncertain interest, instead of emblements, the tenant shall hold until the expiration of the current year, paying the succeeding landlord a fair proportion of the rent.' The lessees of tenants for life had also, at the common law, another most unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any-

[j] Co. Litt. 55.
[k] Co Litt. 55, 56. 1 Roll. Abr. 728.
[l] Co. Litt. 55.
[m] Cro. Eliz. 461. 1 Roll. Abr. 727.

body for the occupation of the land since the last quarter-day, or other day assigned for payment of rent.[n] To remedy which it is now enacted,[o] that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor.

II. Estate tail after possibility of issue extinct.

II. The next estate for life is of the legal kind, as contradistinguished from conventional; viz. that of tenant-*in-tail after possibility of issue extinct.* This happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant-in-tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue:[p] in this case the man has an estate-tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special,* that would not have distinguished [125] him from others; and besides, he has no longer an estate of inheritance, or fee,[q] for he can have no heirs capable of taking *per formam doni.* Had it called him *tenant in tail without issue,* this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant-in-tail without possibility of issue,* this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition, therefore, could so exactly mark him out, as this of tenant-*in-tail after possibility of issue extinct,* which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail, which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was

[n] 10 Rep. 127.

[o] Stat. 11 Geo. II. c. 19, § 15; and stat. 4 & 5 Will. IV. c. 22.

[p] Litt. § 32.

[q] 1 Roll. Rep. 184. 11 Rep. 80.

to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them.[r] A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties: even though the donees be each of them a hundred years old.[s]

This estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant-in-tail; as not to be punishable for waste &c.: or, he is tenant-in-tail, with many of the restrictions of a tenant for life; as, to forfeit his estate, if he aliens it in fee-simple:[t] whereas such alienation by tenant-in-tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, [126] till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. Tenant by curtesy.

III. Tenant *by the curtesy of England*, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the Mirrour[u] to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*,[v] so that probably our word *curtesy* was understood to signify

[r] Co. Litt. 28.

[s] Litt. § 34. Co. Litt. 28.

[t] Co. Litt. 28. 3 & 4 Will. IV. c. 74.

[u] C. 1, § 3.

[v] Craig, l. 2, c. 19, § 4.

rather an attendance upon the lord's *court* or *curtis* (that is, being his vassal or tenant), than to denote any peculiar favour belonging to this island. And therefore it is laid down[w] that, by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands alone: whereas, before issue had, they must both have done it together. It is likewise used in Ireland, by virtue of an ordinance of King Henry III.[x] It also appears to have obtained in Normandy;[y] and was likewise used among the ancient Almains or Germans.[z] And yet it is not generally apprehended to have been a consequence of feudal tenure,[a] though I think some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; for which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant.[b] As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant.

[127]

Requisites to curtesy.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife.[c] 1. The marriage must be legal. 2. The seisin of the wife must be an actual seisin or possession of the lands, 'and that solely and not in joint tenancy with another;' not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed.[d] And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy though there have been no

[w] Litt. § 90. Co. Litt. 30, 67.

[x] Pat. 11 H. III. m. 30, in 2 Bac. Abr. 659.

[y] Grand Coustum. c. 119.

[z] Lindenbrog. LL. Alman. t. 92.

[a] Wright, 194.

[b] F. N. B. 143.

[c] Co. Litt. 30.

[d] 2 Saund. 45, n, (5). Courts of equity, however, allow curtesy of *trusts* and of other interests, which, although mere *rights* in law, are deemed *estates* in equity. 1 Atk. 603; 1 Ves. 174; 2 Jac. & W. 194.

actual seisin of the wife; as, in case of an advowson in gross, where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem.*[e] If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the Crown by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy.[f]

Issue born alive.

3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the *strongest* evidence of its being born alive; but it is not the *only* evidence.[g] The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy: [128] because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him.[h] In gavelkind lands, a husband may be tenant by the curtesy without having any issue.[i] But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate. Therefore, if a woman be tenant-in-tail *male*, and has only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male.[j] And this seems to have been formerly the principal reason, why the husband could not be tenant by the curtesy of any lands of which the wife was not actually seised, because, in order to entitle himself to such estate, he must have begotten issue that might be heir to the wife: and as no one, by the old rule of law, could be heir to the ancestor of any land, whereof the ancestor was not actually seised; therefore, as the husband had never begotten any issue that could be heir to those lands, he

[e] Co. Litt. 29.
[f] Co. Litt. 30. Plowd. 263.
[g] Dyer, 25. 8 Rep. 34.
[h] Co. Litt. 29.
[i] Co. Litt. 30.
[j] Litt. s. 56. Co. Litt. 29.

should not be tenant of them by the curtesy:[k] 'and the law appears to remain still the same on this point, although descent does not now depend upon the seisin of the ancestor.'[l] And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture; for, whether it be born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy.[m] The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate*, and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife: which is the fourth and last requisite to make a complete tenant by the curtesy.

IV. 'We now come to tenancy in *dower*, concerning which the law has been materially altered by the modern statute 3 & 4 Will. IV. c. 105, so far as concerns the rights of women who have been married since the 1st day of January, 1834. With regard to those who were married on or before that day, the law remains in its former state. In the following observations it will be necessary to keep the existence of these two separate cases continually in view. Tenant in *dower*, under the old law, is when the husband of a woman is seised of an estate of inheritance and dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seised *at any time during the coverture*—to hold to herself for the term of her natural life. Under the new law a woman takes a third of such lands and tenements as her husband *died* entitled to (for seisin is not now necessary), and in which her title to dower has not been previously barred in manner to be hereafter explained.'

V. Dower.

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos:* which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify

[129]

k Co. Litt. 40. l See chap. 15. m Co. Litt. 29.

this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there anything in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of King Edmund,[n] the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one-half of the lands, with a proviso that she remained chaste and unmarried;[o] as is usual also in copyhold dowers, or free-bench. Yet some[p] have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens tertia*[q] and *dotalitium*) by the Emperor Frederick the Second; who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the [130] Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals.[r] However this be, the reason which our law gives for adopting it is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children.[s]

In treating of this estate, let us, first, consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos.*[t] But a divorce *a mensa et thoro* only does not destroy the dower;[u] no, not even for

[n] 1 Thorpe, 255.
[o] Rob. Gavelk. 159. Co. Litt. 336.
[p] Wright, 192.
[q] Craig, l. 2, t. 22, § 9.
[r] Mod. Un. Hist. xxxii. 91.
[s] Bract. l. 2, c. 39. Co. Litt. 30.
[t] Bract. l. 2, c. 39, § 4.
[u] Co. Litt. 32.

adultery itself by the common law.[v] Yet now by the statute Westm. 28 (13 Edw. I. c. 34), if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her.[w] It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy: but, as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde, that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may; though Britton gives it another turn: viz., that it is presumed the wife was privy to her husband's crime.[y] However, the statute 1 Edw. VI. c. 12, abated the rigour of the common law in this parti- [131 cular, and allowed the wife her dower. But a subsequent statute[z] revived this severity against the widows of traitors, who are now barred of their dower, but not the widows of felons.[a] An alien also could not at common law be endowed, unless she were queen consort; but the law has now been altered.[b] The wife must be above nine years old at her husband's death, otherwise she shall not be endowed:[c] though in Bracton's time the age was indefinite, and dower was then only due *si uxor possit dotem promereri, et virum sustinere.*[d]

2. Of what dowable.

2. We are next to inquire, of what a wife may be endowed. 'And here we must distinguish between widows who were married on or before the 1st January, 1834, and those whose

[v] Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. l. 3, c. 2.)

[w] And in a case where John de Camoys had assigned his wife, by deed, to Sir William Paynel, knight, which Lord Coke calls *concessio mirabilis et inaudita*, it was decided in Parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. (2 Inst. 435.) This is an indictable offence, being a great public misdemeanor.—[CHRISTIAN.] 3 Moo. & P. 399.

[x] Co. Litt. 31.

[y] Brit. c. 110. P. C. b. 3, c. 33.

[z] 5 & 6 Edw. VI. c. 11.

[a] 54 Geo. III. c. 145; 2 Will. IV. c. 24.

[b] Co. Litt. 31. 7 & 8 Vict. c. 66, s. 16; *Reg.* v. *Manning*, 2 Car. & K. 903.

[c] Litt. § 36.

[d] L. 2, c. 9, § 3.

marriage took place after that day. And, first, as to the former class of widows, whose rights are still regulated by the ancient law. Such a widow is entitled to be endowed of all lands and tenements, of which her husband was solely seised in fee-simple, or fee-tail, in possession, at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir.[e] Therefore, if a man, seised in fee-simple, has a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them.[f] A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he should not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed.[g] The [132] seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again (as formerly where by a fine land was granted to a man, and he immediately rendered it back by the same fine), such a seisin will not entitle the wife to dower:[h] for the land was merely *in transitu*, and never rested in the husband; the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof.[i] And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the re-

[e] Litt. § 36, 53.

[f] Litt. § 53.

[g] Co. Litt. 31.

[h] Cro. Jac. 615. 2 Rep. 77.

[i] This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

strictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for defence of the realm:[j] nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked.[k] Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench.[l] But where dower is allowable, it matters not though the husband alien the lands during the coverture; for he aliens them liable to dower.[m]

'Such is the law with regard to the former of the two classes of widows, which we have mentioned. But as to women who have been married since the 1st day of January 1834, the statute of Will. IV. has made the following alterations. Firstly, seisin of the husband is rendered unnecessary, for if he be merely entitled to a right of entry on the land, his widow shall not the less be entitled to dower out of the same. Secondly, although his interest in the land be merely equitable, yet the wife shall be entitled to dower, a privilege denied to widows under the old law. On the other hand the title to dower does not, as formerly, attach upon all lands of which the husband was at any time seised during the coverture; but the widow can only be endowed out of lands of or to which he dies seised or entitled, and the absolute disposition of lands by him during his life or by his will, defeats the widow's right; nor will she be entitled to dower out of land purchased by the husband, where, in the deed of conveyance to him, or in any deed executed by him, it is declared that she shall not be so entitled. So that whether a wife shall be endowed or not, is now entirely in the will of the husband.'

3. Manner of endowment.

3. Next, as to the manner in which a woman is to be endowed. There are now 'but two' species of dower; 'two others, dower *ad ostium ecclesiæ* and *ex assensu patris* had till lately a nominal existence,[n] but were abolished by the statute 3 & 4

[j] Co. Litt. 31. 3 Lev. 401.

[k] Co. Litt. 32. 1 Jon. 315.

[l] 4 Rep. 22.

[m] Co. Litt. 32.

[n] Dower *ad ostium ecclesiæ* was, where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke, in his translation of Littleton, adds) troth plighted between them, endowed his wife with the whole, or

Will. IV. c. 105; and a fifth, mentioned by Littleton,[o] *de la plus belle*, together with the military tenures, of which it was a consequence, perished long ago. The two which now exist are ' dower by the *common law;* or that which is before described, and dower by particular *custom;*[p] as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter.

[133] History of dower. It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before mentioned; viz. a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue: and afterwards we hear no more of it. Under Henry the Second, according to Glanvil,[q] the dower *ad ostium ecclesiæ* was the most usual species of dower; and here, as well as in Normandy,[r] it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigour, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then was seised, though he might endow her with less: lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits.[s]

[134] But if no specific dotation was made at the church porch, then she was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions:[t] and if the husband had no lands, an endowment in goods, chattels, or

such quantity as he pleased of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, might enter without farther ceremony. Dower *ex assensu patris* was only a species of dower *ad ostium ecclesiæ*, made when the husband's father was alive, and the son, by his consent expressly given, endowed his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) have been made *in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere conjugia.*

[o] § 48, 49.

[p] Litt. § 37.

[q] Glanv. l. 6, c. 1 & 2.

[r] Gr. Coustum. c. 101.

[s] Bract. l. 2, c. 39, § 6.

[t] *De questu suo.* (Glanv. ib.)—*de terris acquisitis et acquirendis.* (Bract. ib.)

money, at the time of espousals, was a bar of any dower[u] in lands which he afterwards acquired.[v] In King John's *Magna Charta*, and the first charter of Henry III., no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217 and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime: yet, in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III. and Edward I.[w] In Henry IV.'s time it was denied to be law, that a woman can be endowed of her husband's goods and chattels:[x] and, under Edward IV., Littleton lays it down expressly, that a woman may be endowed *ad ostium ecclesiæ* with more than a third part; and shall have her election, after her husband's death, to accept such dower or refuse it, and betake herself to her dower at common law. Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiæ* and *ex assensu patris*, fell into total disuse. [135]

Dower at common law.

I proceed, therefore, to consider the method of endowment, or assigning dower by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his

[u] Glanv. l. 6, c. 2.

[v] When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made and troth plighted, used to declare with what specific lands he meant to endow his wife (*quod dotat eam de tali manerio cum pertinentiis, &c.*, Bract. ibid.), and therefore, in the old York ritual (Seld. Ux. Hebr. l. 2, c. 27), there is, at this part of the matrimonial service, the following rubric: "*sacerdos interroget dotem mulieris; et, si terra ei in dotem detur, tunc dicatur Psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis;* Bract. ib.), the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods (or, as the Salisbury ritual has it, *with all my worldly chattel*) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by Magna Charta, cap. 26, and will be farther treated of in the concluding chapter of this book; though the retaining this expression in our liturgy, if of any meaning at all, can now refer only to the right of maintenance which she acquires during coverture, out of her husband's personalty.

[w] Bract. *ubi supr.* Britton, c. 101, 102. Flet. l. 5, c. 23, §§ 11, 12.

[x] P. 7 Hen. IV. 13, 14.

licence, lest she should contract herself, and so convey part of the feud to the lord's enemy.[y] This licence the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But to remedy these oppressions, it was provided, first by the charter of Henry I., and afterwards by *Magna Charta*, that the widow should pay nothing for her marriage, nor should be distrained to marry afresh, if she chose to live without a husband, but should not, however, marry against the consent of the lord; and farther, that nothing should be taken for assignment of the widow's dower, but that she should remain in her husband's capital mansion-house for forty days after his death, during which time her dower should be assigned. These forty days are called the widow's *quarantine;* a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other. The particular lands, to be held in dower, must be assigned[z] by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so [136] holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under tenancy completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *Quia Emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law and the sheriff is appointed to assign it.[a] Now if the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, and the like.[b]

Jointures.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the common law

[y] Mirr. c. 1, § 3.

[z] Co. Litt. 34, 35.

[a] Co. Litt. 34, 35. By the writs of *right of dower*, or of *dower under nihil habet*, which, as we shall see afterwards, are two of the three real actions not abolished by 3 & 4 Will. IV. c. 27.

[b] Co. Litt. 32.

diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, after the alteration of the ancient law respecting dower *ad ostium ecclesiæ*, which occasioned the entire disuse of that species of dower, jointures were introduced in their stead, as a bar to the common law. Which leads me to inquire, lastly,

Dower, how barred.

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them:[c] and, by the statute of Gloucester, (6 Edw. I. c. 7,) if a dowager aliens the lands assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. 'A woman, married before January 1, 1834, may release her title to dower by deed, in conformity with the statute 3 & 4 Will. IV. c. 27.[d] Dower may also be barred' by jointure, as regulated by the statute 27 Henry VIII. c. 10.

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Jointure.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke: "a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." This description is framed from the purview of the statute 27 Hen. VIII. c. 10, before mentioned, commonly called the statute of *uses*, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the *use* or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee-simple, yet the wife was not entitled to any dower therein: he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their

c Co. Litt. 39.

d See 2 Sug. V. & P. 308 (10th Ed.).

lives, in joint-tenancy, or jointure: which settlement would be a provision for the wife in case she survived her husband. At length the Statute of Uses ordained, that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the [138] same statute provided that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower. But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 'Yet it may be made determinable by her own act, as if it be limited to her *durante viduitate*, an estate which may continue for her life, unless she voluntarily puts an end to it by a second marriage.'[e] 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, (as she had in dower *ad ostium ecclesiæ*,) and may either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. 'If the husband by his will make provision for his widow, clearly expressing his intention that the same should be in lieu of her legal dower, or if such intention can be clearly implied, this will also have the effect of putting the widow to her election.[f] And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law.[g]

[e] 4 Rep. 3.

[f] *Chalmers* v. *Storil*, 2 Ves. and Bea. 222.

[g] 'But if the jointure be made by ante-nuptial settlement, in consideration of which, the wife being adult, agrees to relinquish her right of dower, and she be afterwards evicted, it seems that although her right to dower is revived at law, a Court of Equity will interfere to prevent her enforcing the legal right.' (*Simpson* v. *Gutteridge*, 1 Madd. 609.)

There are some advantages attending tenants in dower that do not extend to jointresses; and so, *vice versâ*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt; if contracted during the coverture.[h] But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower.[i] And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.[j] Wherefore Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ*, in his day, the most eligible species of any.

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'Besides the method of jointures, the ingenuity of modern times devised other modes of preventing the wife from acquiring a title to dower. One of these has been most extensively employed, and is still applicable to the case of widows who were married on or before the 1st day of January, 1834. Under the old law, if an estate were conveyed simply to a man in fee-simple or in fee-tail, the title of his widow to dower, in the absence of any bar by way of jointure, immediately attached, and he could not again sell the estate discharged of this claim, without the concurrence of the wife in a fine or recovery; or since the statute abolishing those modes of assurance, in a statutory deed of disposition or release. To avoid this inconvenience it became usual in the conveyance of estates, to limit the lands to the purchaser for his natural life, with remainder to a trustee in trust for him during his life, in case of his life-estate becoming forfeited or determined

[h] Co. Litt. 31 a. F. N. B. 150.

[i] Co. Litt. 36.

[j] Co. Litt. 37. A jointure is not forfeited by the adultery of the wife, as dower is; and the Court of Chancery will decree against the husband a performance of marriage articles, though he alleges and proves that his wife lives separate from him in adultery: (3 Cox's P. Wms. 277.)—[CHRISTIAN.]

by any means during his lifetime, with remainder to the purchaser in fee. It followed from the construction put upon these limitations by the courts of law, that the husband during his lifetime never had an estate of inheritance in possession in the lands, and consequently the wife's title to dower never attached. Through the medium of the Statute of Uses, hereafter to be explained, the purchaser was also clothed with a power of appointment by which he could at once dispose of the fee-simple in any manner he pleased, and which effectually defeated the wife's claim. This plan, known among conveyancers as the limitation to uses to bar dower, is still used whenever it is necessary to convey lands to a married man, whose marriage took place on or before the 1st of January, 1834.'

'But with regard to purchasers married since that day, this device, although sometimes employed for the purpose of obviating future questions as to the date of the marriage, is no longer necessary. For now a husband, whether he become entitled to an estate by actual conveyance, or by inheritance or devise, may absolutely dispose of it either in his lifetime or by his will, or may charge or encumber it as he pleases, to the exclusion of his wife's title to dower. He may, either at the time of taking a conveyance to himself of the estate, or at any time thereafter, and either by deed or by his will declare that his wife shall not be entitled to dower out of his estates; or he may declare that she shall be entitled to it out of some portion only of the property. The widow's right to dower may also, by the husband's will, be made subject to any condition, restriction, or direction, which he chooses to impose, and her right will be defeated by a devise to her of lands or of any estate or interest therein, out of which she would otherwise be dowable, unless a contrary intention shall be declared by the will.'

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

OF estates that are less than freehold, there are three sorts; [140] 1. Estates for years; 2. Estates at will; 3. Estates by sufferance.

I. Estates for years.

I. An estate for *years* is where one has the possession of lands or tenements, for some determinate period: it takes place, for example, where a man letteth lands to another for the term of a certain number of years, agreed upon between the lessor and the lessee,[a] and the lessee enters thereon. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings: a year being the shortest term which the law in this case takes notice of. And this may, not improperly, lead us into a short digression, concerning the division and calculation of time by the English law.

Division of time.

The space of a year is a determinate and well-known period, consisting commonly of 365 days: for though in bissextile or leap years it consists properly of 366, yet by [141] the statute 21 Hen. III. the increasing day in the leap year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous; there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian

[a] We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. §§ 57, 58, 67.)

division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks.[b] Therefore a lease for "twelve months" was held to be only for forty-eight weeks; whereas if it had been for "*a* twelvemonth" in the singular number, it was good for the whole year. For herein the law receded from its usual calculation, because the ambiguity between the two methods of computation ceased; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. 'Now, however, by statute 13 and 14 Vict. c. 21, the word *month* in Acts of Parliament made since the beginning of the session 1851-52, means *calendar* months, unless otherwise expressed.' In the space of a day, all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes.[c] Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

Terms for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords, but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who [142] were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate; but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common

[b] 6 Rep. 61. [c] Co. Litt. 135.

recovery suffered by the tenant of the freehold;[d] which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

Short terms.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack-rent; and indeed we are told,[e] that by the ancient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period:[f] and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III.[g] and probably of Edward I.[h] But certainly, when by the statute 51 Hen. VIII. c. 15, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds, as [143] when they were little better than tenancies at the will of the landlord.

Certainty of duration.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end.[i] But *id certum est, quod certum reddi potest:* therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for

[d] Co. Litt. 46.

[e] Mirror, c. 2, § 27. Co. Litt. 45, 46.

[f] Madox, Formulare Anglican. n°. 239, fol. 140. Demise for eighty years, 21 Ric. II. . . . . . Ibid. n°. 245, fol. 146, for the like term, A.D. 1429. . . . . . Ibid. n°. 248, fol. 148, for fifty years, 7 Edw. IV.

[g] 32 Ass. pl. 6. Bro. Abr. t. *Mordauncestor*, 42; *Spoliation*, 6.

[h] Stat. of Mortmain, 7 Edw. I. Co. Litt. 45.

years;[j] for though it is at present uncertain, yet when J. S. has named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease.[k] A lease for so many years as J. S. shall live, is void from the beginning;[l] for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good:[m] for there is a certain period fixed, beyond which it cannot last; though it may determine sooner on the death of J. S., or his ceasing to be parson there.

May commence *in futuro.*

[144]

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate.[n] Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. 'For no estate of freehold can commence *in futuro;* because at common law it could not be created without livery of seisin, or corporal possession of the land, which could not be given when the estate was to commence at a future time.'[o] And, because no livery of seisin was necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor, indeed, does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini:* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the

[j] 6 Rep. 35.
[k] Co. Litt. 46.
[l] Co Litt. 45.
[m] Co. Litt. 45.
[n] Co. Litt. 46.
[o] 5 Rep. 94.

land, but of the term of years;[p] the possession or seisin of the *land* remaining still in him who has the freehold. Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time;* as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said *term* to B. for six years, and A. surrenders or forfeits his lease at the end of *one* year, B.'s interest shall immediately take effect: but if the remainder had been to B. from and after the expiration of the said *three years,* or from and after the expiration of the said *time,* in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term.[q]

Tenant for term of years has incident to and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote;[r] terms which have been already explained.

[145]

Rule as to emblements.

With regard to emblements, or the profits of lands sowed by tenant for year, there is this difference between him and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of.[s] But where the lease for years depends upon an uncertainty: as, upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, had the emblements in the same manner that a tenant for life or his executors was entitled thereto; 'and now by the statute 14 and 15 Vict. c. 25, instead of emblements, the tenant shall continue to hold and occupy the land

[p] Co. Litt. 46.
[q] Co. Litt. 45.
[r] Co. Litt. 53.
[s] Litt. § 68.

until the expiration of the current year of his tenancy, and shall then quit, paying to the new landlord a fair proportion of the current year's rent. It is different if the lease be determined by the act of the party himself: as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor and not to the lessee, who has determined his estate by his own default.[t]

II. Estates at will.

II. The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession.[u] Such tenant has no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexions with the other at his own pleasure.[v] Yet this must be understood with some [146] restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits. And this for the same reason, upon which all the cases of emblements turn, viz., the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.[w]

Determination of will.

What act does, or does not, amount to a determination of the will on either side, was formerly matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination in the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land,[x] or notice must be given to the lessee[y])

[t] Co. Litt. 55.
[u] Litt. § 68.
[v] Co. Litt. 55.
[w] Co. Litt. 55, 56.
[x] Co. Litt. 55.
[y] 1 Ventr. 248.

the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber,[z] taking a distress for rent and impounding it thereon,[a] or making a feoffment, or lease for years of the land to commence immediately;[b] any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure;[c] or, what is *instar omnium*, the death or outlawry of either lessor or lessee;[d] puts an end to or determines the estate at will.

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements before mentioned; and, by a parity of reason, [147] the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.[e] And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year.[f] But, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.[g]

Copyholds.

There is one species of estates at will that deserves a more particular regard than any other; and that is, an estate held by copy of court-roll; or, as we usually call it, a *copyhold* estate. This, as was before observed, was, in its origin and foundation, nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs

[z] Co. Litt. 55. *Turner* v. *Bennett*. 9 Mee. & W. 643.

[a] Co. Litt. 57.

[b] 1 Roll. Abr. 860. 2 Lev. 88.

[c] Co. Litt. 57.

[d] 5 Rep. 116. Co. Litt. 57, 62.

[e] Litt. § 69.

[f] Salk. 414. 1 Sid. 339.

[g] This kind of lease was in use in the reign of Henry VIII., when half-a-year's notice was required to determine it. (T. 13 Hen. VIII. 15, 16.)

established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court-rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will; the custom having arisen from a series of [148] uniform wills. And therefore it is rightly observed by Calthorpe,[h] that "copyholders and customary tenants differ not so much in nature as in name; for although some be called copyholders, some customary, some tenants by the virge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure: all the said lands are holden in one general kind, that is by custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure."

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humour and temper of the respective ancient lords (from whence we may account for their great variety), such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, and hold them united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of these

[h] On Copyholds, 51, 54.

interests amount to freehold; for the freehold of the whole manor abides always in the lord only,[i] who has granted out the use and occupation, but not the corporal seisin or true legal possession, of certain parcels thereof, to these his customary tenants at will.

The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple, and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant [149] of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein.[j] The lords, therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and, of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be styled in their admissions tenants at the will of the lord—the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest; and therefore continued and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure, which are derived from the ancient tenants in villein-socage, and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allow-

Customary freeholders.

[i] Litt. § 81. 2 Inst. 325.

[j] Mirr. c. 2, § 28. Litt. § 204, 5, 6.

ing them to be capable of enjoying a freehold interest; and therefore the law does not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the [150] tenants themselves; who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not of a freehold *tenure*.[k]

However, in common cases, copyhold estates are still ranked (for the reasons above mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders (who were formerly nothing better than bondmen), equal to that of the lord himself, in the tenements holden of the manor; nay, sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and, in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

Enfranchisement of Copyholds.

'Copyhold, or customary tenure, may be put an end to by a grant from the lord of the freehold, or of his seignoral rights. This is called *enfranchisement*, and the tenant by this means becomes seised in common socage of the lands, which he thenceforth holds as tenant to the superior lord, of whom the lord held before the grant. If, again, copyhold and freehold titles become united in one person, *extinguishment* takes place, the copyhold interest merging and becoming extinguished in the superior one. Formerly the granting of enfranchisement to a tenant was entirely within the breast of the lord; and the tenant had no means of obtaining an alteration in his tenure. Where the fine imposed by the lord upon the change of a tenant is arbitrary instead of certain, the position of the copyholder is a very disadvantageous one, and the legislature has of late years been disposed to look upon the impediments thus opposed to the free alienation of lands as a public grievance. Accordingly, several Acts have been passed during the present reign, with the object of facilitating enfranchisement, the last of which, 15 & 16 Vict. c. 51, has enabled tenants to compel the lord

[k] 'The places in which the greater part of these customary freeholds exist, are, Cumberland, Westmoreland, Lancashire, parts of Durham and Northumberland, and the northern border of Yorkshire.'

to grant enfranchisement, and the lord if he pleases to compel tenants to accept it; in either case on terms which, in case of dispute, are fixed by the Commissioners appointed for this purpose by the statute.'[l]

III. Estate at sufferance.

III. An estate at *sufferance*, is, where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As, if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh lease from the owner of the estate. Or, if a man makes a lease at will and dies, the estate at will is thereby determined: but if the tenant continues in possession, he is tenant at sufferance.[m] But no man can be tenant at sufferance against the Crown, to whom no *laches*, or neglect, in not entering and ousting the tenant is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder.[n] But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger:[o] and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

[151]

Thus stands the law, with regard to tenants by sufferance: and landlords are obliged in these cases to make formal entries upon their lands,[p] and recover possession by the legal process of ejectment; and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c. 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in writing given by him to

[l] The Copyhold Enfranchisement Acts, are 4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55; and 15 & 16 Vict. c. 51.

[m] Co. Litt. 57.

[n] Co. Litt. 57.

[o] Co. Litt. 57.

[p] 5 Mod. 384.

whom the remainder or reversion of the premises shall belong, for delivering the possession thereof, such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. c. 19, in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.[q]

[q] 'In the third volume of these Commentaries, I shall have an opportunity of explaining the various remedies which landlords have for the recovery of the possession of premises, which are held over by their tenants, after the expiration of the term for which the premises were let.'

CHAPTER X.

OF ESTATES UPON CONDITION.

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition;* being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.[a] And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition, thus understood, are of two sorts:—1. Estates upon condition *implied.* 2. Estates upon condition *expressed;* under which last may be included,—3. Estates held in *vadio, gage,* or *pledge;* 4. Estates by *statute merchant,* or *statute staple;* 5. Estates held by *elegit.* [152]

I. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As, if a grant be made to a man of an office, generally, without adding other words, the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person.[b] For an office, either public or private, may be forfeited by *mis-user* or *non-user,* both of which are breaches of this implied condition: 1. By *mis-user,* or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user,* or neglect; which in public offices, [153]

I. Condition implied.

[a] Co. Litt. 201.

[b] Litt. §§ 378, 379.

that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby.[c] For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.[d]

Forfeitures.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others, for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoffed a stranger in fee-simple: this 'was before the statute 8 & 9 Vict., c. 106,' a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz., that they shall not attempt to create a greater estate than they themselves are entitled to.[e] So, if tenants for life, or in fee, commit a felony, the queen or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.[f]

[154]

II. Condition expressed.

II. An estate on condition expressed in the grant itself is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.[g] These conditions are, therefore, either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subse-

Precedent or subsequent.

[c] Co. Litt. 233.

[d] 9 Rep. 50.

[e] Co. Litt. 215.

[f] 'The stat. 54 Geo. III. c. 145, confines the effect of forfeiture to the life of the offender, so as not to disinherit the heir, or prejudice any other person, except in cases of high treason, murder, and petit treason, which last species of offence is, however, now abolished.'

[g] Co. Litt. 201.

quent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A., upon his marriage with B., the marriage is a precedent condition, and till that happens, no estate is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid.[h] But, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.[i] To this class may also be referred all base fees, and fees-simple conditional at the common law. Thus, an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter, as, *durante viduitate, &c.;* these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any of these [155] subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

Conditional limitation.

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton[j] denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation;* as when land is granted to a man *so long as* he is parson of

[h] Co. Litt. 217. [i] Litt. § 325.
[j] Litt. § 380. 1 Inst. 234.

Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like.[k] In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.),[l] the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.[m] Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A. to B., on condition that within two years B. intermarry with C., and on failure thereof then to D. and his heirs), this the [156] law construes to be a limitation and not a condition:[n] because, if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B. determines and that of D. commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for nonpayment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the nonpayment, for none but the heir himself could have entered for a breach of condition.[o]

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in

[k] 10 Rep. 41.
[l] 10 Rep. 42.
[m] Litt. § 347. Co. Litt. 214 b. Stat. 32 Hen. VIII. c. 34.
[n] 1 Vent. 202.
[o] Cro. Eliz. 205. Roll. Abr. 411.

itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold;[p] because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A., B., and C., or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

Impossible conditions.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the grantor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that is, [157] to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a grant be made to a man in fee-simple, on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day (within which time the woman dies, or the grantor marries her himself), or unless he kills another, or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the grantee. For he has by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee: here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he has no estate until the condition be performed.[q]

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are,—

III. Estates held *in vadio*, in *gage*, or pledge: which are

[p] Co. Litt. 42.

[q] Co. Litt. 206.

of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

III. Mortgage.

'*Vivum vadium*, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another, and grants him an estate, as of 20*l.* *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living; it subsists and survives the debt: and, immediately on the discharge of that, results back to the borrower. 'This mode of pledging is not now in use.' But *mortuum vadium*, a dead pledge, or *mortgage* 'which is the kind now universally employed,' is where a [158] man borrows of another a specific sum (*e. g.* 200*l.*), and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land which is so put in pledge, is by law, in case of nonpayment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.[r] It was formerly doubted (though the doubt has been long ago overruled by our courts of equity[s]), whether by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee, and it was, therefore, usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money. This course was for a long period extensively adopted, and is still sometimes resorted to, having this advantage that on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Form of mortgage.

As soon as the estate is created, the mortgagee may im-

[r] Litt. § 332.

[s] Hardr. 466.

mediately enter on the lands; but is liable to be dispossessed upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor 'within a reasonable time, which has been fixed by statute 3 & 4 Will. IV. c. 27, s. 28, at twenty years after the last acknowledgment of title by the mortgagee, when he is in possession of the land, or after the last payment of any part of the principal or interest of the mortgage,' to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for nonpayment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *Equity of Redemption:* and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium.* On the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption, without possibility of recall. 'In modern mortgages it is usual to give the mortgagee an absolute power of sale, which enables him to obtain the advantage of his security by selling the property mortgaged much more conveniently than by a suit for foreclosure; and courts of equity do not interfere with the exercise of such powers, the mortgagee being only bound to account to the mortgagor for the residue of the proceeds of

Entry of mortgagee.

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Equity of redemption.

Foreclosures.

the sale, after paying himself principal, interest, and the expenses of the sale.' Nor is it usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law, whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor.[t] But after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee cannot maintain an action of ejectment; but may be compelled to re-assign his securities.[u] In Glanvil's time, when the universal [160] method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet;*" for which the reason given is to prevent subsequent and fraudulent pledges of the same land; "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari.*" The frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law, 'and the legislature has been obliged to interfere and to declare that in some cases of fraudulent mortgages, the fraudulent mortgagor shall forfeit all equity of redemption whatever.'[v]

IV. Statute staple and statute merchant.

IV. A fourth species of estates, defeasible on condition subsequent, were those held by *statute merchant* and *statute staple*, 'but they have long fallen into total disuse.' They were very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof should discharge a debt liquidated or ascertained. Both the statute merchant and statute staple were securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute of 13 Edw. I. *de mercatoribus*, and thence

[t] Inst. l. 4, t. 6, § 7.

[u] Stat. 7 Geo. II. c. 20, re-enacted by the Common Law Procedure Act, 1852, s. 219.

[v] Stat. 4 & 5 W. & M. c. 16.

called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns, from whence this security was called a statute staple. They were both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor might be imprisoned, and his goods seized in satisfaction of the debt, but also his lands might be delivered to the creditor, till out of the rents and profits of them the debt might be satisfied; and during such time as the creditor so held the lands, he was tenant by statute merchant or statute staple. There was also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the Chief Justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction was extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. [161] c. 6, amended by 8 Geo. I. c. 52, which directs such recognizances to be enrolled and certified into Chancery. But these, by the statute of frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

V. Elegit.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third book of these Commentaries. At present I need only mention, that it is the name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained a judgment for his debt, the sheriff gives him possession of the defendant's lands and tenements, to be occupied and enjoyed, until his debt and damages are fully paid: and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the

debts of the owner, were softened much earlier, and much more effectually for the benefit of trade and commerce, than for any other consideration.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the [162] observation of Sir Edward Coke:—"These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds" (which makes them an exception to the general rule); "because, though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though, to recover their estates, they shall have the same remedy *as* a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*." This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold: but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has, therefore, thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors: because they being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

[163]

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession* or in *expectancy:* and of expectancies there are two sorts; one created by the act of the parties, called a *remainder;* the other by act of law, and called a *reversion.*

I. Estates in possession.

I. Of estates in *possession* (which are sometimes called estates *executed,* whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenants' possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will, therefore, require a minute discussion, and demand some degree of attention.

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II. Estates in remainder.

II. An estate then in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs for ever: here A. is tenant for years, remainder to B. in fee. In the

first place, an estate for years is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee.[a] They are indeed different *parts*, but they constitute only one *whole:* they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs for ever: this makes a tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A.'s estate for years carved out of it: and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple:[b] because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee has in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular [165] estate, with all the remainders expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.*, and 60*l.* is the remainder of it; wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be ob-

[a] Co. Litt. 143.

[b] Plowd. 29. Vaugh. 269.

served in the creation of remainders, and the reasons upon which those rules are founded.

1. Particular estates.

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder.[c] As, an estate for years to A., remainder to B. for life; or an estate for life to A., remainder to B. in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

Freehold not to commence *in futuro*.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law,[d] to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro;* but it ought to take effect presently, either in possession or remainder:[e] because at common law no freehold in lands could pass without livery of seisin, which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time,

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[c] Co. Litt. 49. Plowd. 25. [d] Raym. 151. [e] 5 Rep. 94.

it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here by the livery the freehold is immediately created, and vested in B., during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*, though to be occupied and enjoyed *in futuro*.[f]

Particular estate supports remainder.

As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over.[g] For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in [167] order to constitute a remainder. If the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder;* for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken.[h]

2. Remainder and particular estate commence together.

2. A second rule to be observed is this: that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate.[i] As, where there is an estate to A. for life, with remainder to B. in fee: here B.'s remainder in fee passes from the grantor at the

[f] It is to be remembered that the immediate freehold may now be conveyed by grant (8 & 9 Vict. c. 106.)

[g] 8 Rep. 75.

[h] Raym. 151.

[i] Litt. § 671. Plowd. 25.

same time that the grant is made to A. of his life estate in possession.[j]

[168] 3. Remainder must vest on determination of particular estate.

3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines.[k] As, if A. be tenant for life, remainder to B. in tail: here B.'s remainder is vested in him, at the creation of the particular estate to A. for life: or if A. and B. be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. has any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B. should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever.[l] And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby:[m] the thing supported must fall to the ground, if once its support be severed from it.

[j] It was this which induced the necessity, at common law, of livery of seisin being made on the particular estate, whenever a *freehold* remainder was created. For, if it was limited even on an estate for years, it was necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder was void. Not that the livery was necessary to strengthen the estate for years; but, as livery of the land was requisite to convey the freehold, and yet could not be given to him in remainder without infringing the possession of the lessee for years, therefore the law allowed such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, both being but one estate in law.

[k] Plowd. 25. 1 Rep. 66.

[l] 1 Rep. 138.

[m] 3 Rep. 21.

Remainder vested or contingent.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed* whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As, if A. be tenant for twenty [169] years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious or uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.[n]

Uncertainty of person.

First, they may be limited to a dubious and uncertain *person*. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B. will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest.[o] But to remedy this hardship, it is enacted by statute 10 & 11 Will. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them while yet in their mother's womb.

Potentia propinqua.

'It is laid down by the older authorities that' this species of contingent remainders to a person not in being, must be

[n] 3 Rep. 20.

[o] Salk. 228. 4 Mod. 282.

limited to some one, that may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines.[p] As if an estate be made to A. for life, remainder to the heirs of B.; now if A. dies before B., the remainder [170] is at an end; for during B.s life he has no heir, *nemo est hæres viventis:* but if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B.'s dying before A. is *potentia propinqua*, and therefore allowed in law.[q] But a remainder to the right heirs of B. (if there be no such person as B. *in esse*) is void.[r] For here there must two contingencies happen: first, that such a person as B. shall be born; and secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who has none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name.[s] A limitation of a remainder, to a bastard before it is born, is not good;[t] for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. 'At the present day, however, the law looks less to the abstract probability of an event, upon which an estate is limited, than to the possibility of its happening within a definite period; and in general a limitation which is to take place, if at all, within the space laid down by the rule against perpetuities, as it is called, and which is hereafter to be explained, will be good, notwithstanding the improbability of the event by which it is to be determined.'[u] Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

Potentia remota.

Event uncertain.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As

[p] 2 Rep. 51.
[q] Co. Litt. 378.
[r] Hob. 33.
[s] 5 Rep. 51.
[t] Cro. Eliz. 509.
[u] See 3rd Report of Real Property Commissioners, and Butler's Fearne, Cont. Rem. 261 (7th Ed.).

where land is given to A. for life, and in case B. survives him, then with remainder to B. in fee; here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and if B. dies first, it never can vest in his heirs, but is for ever gone; but if A. dies first, the remainder to B. becomes vested.

[171] Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void;[v] but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders defeated.

Contingent remainders 'were formerly liable to be' *defeated* by destroying or determining the particular estate upon which they depended, before the contingency happened whereby they became vested.[w] And where there was tenant for life, with divers remainders in contingency, he might, not only by his death, but by alienation, surrender, or other methods destroy and determine his own life-estate before any of those remainders vested, the consequence of which was, that he utterly defeated them all. As, if there were tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son was born, surrendered his life-estate, he by that means defeated the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the ancient rules of law, it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent re-

[v] 1 Rep. 130. [w] 1 Rep. 66, 135.

mainders; in whom there was vested an estate in remainder for the life of the tenant for life, to commence when his estate determined. If therefore his estate for life determined otherwise than by his death, the estate of the trustees, for the residue of his natural life, took effect, and became a particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of a particular tenant for life;[x] and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use; 'and it has continued to be used down to our own day. A recent Act, 8 & 9 Vict. c. 106, has, however, now done away with the necessity of this mode of limitation by enacting that a contingent remainder existing at any time after the 31st December, 1844, shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. This does not indeed prevent the failure of a contingent remainder, if the particular estate determine by effluxion of time, or by some event in which it was in its creation limited to determine, before such remainder becomes vested. But this is not the danger which it was intended to guard against by the introduction of trustees to preserve contingent remainders. The statute makes no alteration in the general rule which requires a contingent remainder to be supported by a particular estate of freehold; it only prevents its destruction, if such previous estate be determined in the particular modes mentioned.'

Trustees to preserve.

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Thus the student will observe how much nicety is required in creating a remainder; and I trust he will in some measure see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular

[x] See Moor. 486. 2 Roll. Abr. 797, pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

subtilties and refinements into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided; neither are they consonant to the design of these elementary disquisitions. I must not, however, omit, that in devises by last will and testament (which being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice), in these devises, I say remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

Executory devises.

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency, 'or, as it has been more exactly defined, any devise of a future interest which is not preceded by an estate of freehold created by the same will; or which being so preceded, is limited to take effect before or after, and not at the expiration of such prior estate of freehold.'[y] It differs from a remainder in three very material points: 1. That it needs not any particular estate to [173] support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder, without any particular estate to support it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise.[z] For since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do if it passes at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence

[y] 1 Jarm. Wills. 778.

[z] 1 Sid. 153.

in futuro in other cases, is founded on the ancient necessity of actual seisin, which always operated *in præsenti.* And since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it followed, that such an executory devise, not being a present interest, could not be barred by a recovery, suffered before it commenced.[a]

2. Executory devisee of fee upon fee.

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A. and his heirs; but if he dies before the age of twenty-one, then to B. and his heirs: this remainder, though void in a deed, is good by way of executory devise.[b] But in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term [174] of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors;[c] because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation),[d] estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one-and-twenty years afterwards. As when lands are devised to such unborn son of a feme-covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this has been decreed to be a good executory devise.[e]

Rule of perpetuities.

3. By executory devise a term of years may be given to

[a] Cro. Jac. 593.

[b] 2 Mod. 289.

[c] 12 Mod. 287. 1 Vern. 164.

[d] Salk. 229.

[e] Forr. 232. To this period of twenty-one years, more recent decisions have added the period of gestation, where gestation actually exists. But the term of twenty-one years may be a term in gross, and need not have reference to any actual minority. (*Cadell* v. *Palmer*, 1 Cl. & Fin. 372.)

3. Devise over of a term of years.

one man for his life, and afterwards limited over in remainder to another, which could not be done by deed; for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.[f] And, at first, the courts were tender, even in the case of a will, restraining the devisee for life from alienating the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place:[g] for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held,[h] that the devisee for life has no power of alienating the term, so as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was held,[i] that though such remainders might be limited to as many persons successively as the devisor should think proper, yet they must all [175] be *in esse* during the life of the first devisee, for then all the candles were lighted and consuming together, and the ultimate remainder was in reality only to that remainder-man who happened to survive the rest. 'And it is now settled that limitations of this kind are good, provided they do not contravene the rule of perpetuities previously stated, which allows twenty-one years beyond the life of the first devisee, for the happening of the contingency upon which the remainder takes effect.'[j]

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species which is created by the act and operation of the law itself, and this is called a reversion.

III. Estates in reversion.

III. An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.[k] Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without

[f] 8 Rep. 95.
[g] Bro. tit. *Chattels*, 23. Dyer, 74.
[h] Dyer, 358. 8 Rep. 96.
[i] Sid. 451. See 3 Mer. 194.
[j] 1 Vern. 234. 3 Atk. 282.
[k] Co. Litt. 22.

any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor.[l] For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death, or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence [176] the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so to the reversion.[m] The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto, though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso:* for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale.*"

Difference of remainders and reversions.

These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere

[l] 1 Inst. 142. [m] Co. Litt. 143, 151, 152.

reversion,[n] to which rent and fealty shall be incident. Which 'rent and fealty, previous to the statute 3 & 4 Will. IV. c. 106, altering our law of descents, could' only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done;[o] for it was considered to be the old estate, which was originally in him, and never yet was out of him. 'Now, however, by the above-mentioned statute, when any land shall have been limited by any assurance executed after 31st December, 1833, to the person or the heirs of the person who shall thereby have conveyed the land, such person shall be considered to have acquired the land as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.' So, if a man grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. has a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A.'s estate.[p]

[177] In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Anne, c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery and order made thereupon), once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Merger.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate,[q] the less is immediately annihilated; or in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus if there be tenant for years, and the reversion in fee-simple descends to

[n] Cro. Eliz. 321.
[o] 3 Lev. 407.
[p] 1 And. 23.
[q] 3 Lev. 437.

or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*), there is no merger. Therefore, if the tenant for years dies, and makes him who has the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he has the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who has the reversion in fee marries the tenant for years, there is no merger; for he has the inheritance in his own right, the lease in the right of his wife.[r] An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee.[s] For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words, [178] of the statute *De Donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant has the sole interest in them, and has full power at any time to defeat, destroy, or surrender them to him that has the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate.[t] But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it, and afterwards could only do it by certain special modes, by a fine, a recovery, and the like: it would therefore have been strangely improvident to have permitted the tenant-in-tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy-in-tail, which cannot be surrendered, cannot also be merged in the fee.

[r] Plowd, 418. Cro. Jac. 275. Co. Litt. 338.

[s] 2 Rep. 61. 8 Rep. 74.

[t] Cro. Eliz. 302.

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT TENANCY, COPARCENARY, AND COMMON.

[179] WE come now to treat of estates, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common.

I. Estates in severalty.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

II. Estates in joint-tenancy.

II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such [180] grants an estate is called an estate in joint-tenancy, and sometimes an estate in *jointure*, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint estate, which, by virtue of the statute

27 Hen. VIII. c. 10, is vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire, how these estates may be *created;* next, their *properties* and respective *incidents;* and lastly, how they may be *severed* or *destroyed.*

1. Creation of joint estates.

1. The *creation* of an estate in joint-tenancy, depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As, therefore, the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

2. Properties of joint estates.

2. The *properties* of a joint estate are derived from its unity, which is fourfold: the unity of *interest,* the unity of *title,* the unity of *time,* and the unity of *possession:* or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

Unity of interest.

First, they must have one and the same *interest.* One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. But if land be limited to A. and B. for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, it makes them joint-tenants of the inheritance. If land be granted to A. and B. for their lives, and to the heirs of A.; here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty: or if land be given to A. and B., and the heirs of the body of A.; here both have a joint estate

[181]

Unity of title.

for life, and A. has a several remainder in tail. Secondly, joint-tenants must also have an unity of *title:* their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time;* their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B.; or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A. and B.; and during the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heir: and then B. dies, whereby the other moiety becomes vested in the heir of B.: now A.'s heir and B.'s heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another.[a] Yet where a grant was made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times:[b] because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation, 'and it is clear that at the present day persons may take as joint tenants *by way of use,* though at different times.'[c] Lastly, in joint-tenancy there must be an unity of *possession.* Joint-tenants are said to be seised *per my et per tout,* by the *half* or *moiety,* and by *all:* that is, they each of them have the entire possession, as well of every *parcel* as of the *whole.*[d] They have not, one of them, a seisin of one-half or moiety,

Unity of time.

[182]

Unity of possession.

[a] Co. Litt. 188.
[b] Dyer, 340. 1 Rep. 101.
[c] *Stratton* v. *Best,* 2 Br. 240.
[d] Litt. § 288. 5 Rep. 10.

and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.[e] And, therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.[f]

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenants' estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion.[g] If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate.[h] On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them:[i] and the entry or re-entry of one joint-tenant is as effectual in law as if it were the act of both.[j] In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other.[k] But if two or more joint tenants be seised of an advowson, and they present different clerks, [183] the bishop may refuse to admit either; because neither joint-tenant has a several right of patronage, but each is seised of the whole; and if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to

[e] *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Bract. l. 5, tr. 5, c. 26.

[f] Litt. § 665. Co. Litt. 187. Bro. Abr. t. *Cui in vita,* 8. 2 Vern. 120. 2 Lev. 39.

[g] Co. Litt. 214.

[h] Co. Litt. 192.

[i] Co. Litt. 49.

[j] Co. Litt. 319, 364. 'But where one joint-tenant is in possession, or receipt of the entirety, or more than his undivided share of the land, rents, or profits, *for his own benefit,* such possession is not deemed the possession of the other joint-tenant.' (3 & 4 Will. IV. c. 27, s. 12.)

[k] Co. Litt. 195.

incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate.[l] Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land;[m] for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds,[n] 'but the independent dealings of one joint-tenant operate only upon his share of the estate, and are, as far as they are effectual, a severance of the joint-tenancy.' If any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2, c. 22.[o] 'So one joint-tenant may maintain ejectment against the other, if he can show any actual ouster, as if one were to receive and retain the whole rents and profits of the estate.' So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver,[p] yet now by the statute 4 Ann. c. 16, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy. 'This action is, however, little resorted to, the practice being to proceed in a Court of Equity for an account.'[q]

Survivorship.

From the same principle also arises the remaining grand incident of joint-estates, viz., the doctrine of *survivorship;* by which, when two or more persons are seised of a joint estate of inheritance, for their own lives, or *pur auter vie,* or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate. [184] This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants

[l] Co. Litt. 186.
[m] 3 Leon. 262.
[n] 1 Leon. 234.
[o] 2 Inst. 403.
[p] Co. Litt. 200.
[q] Mitf. Pl. 109.

is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements, for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains, and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

Jus accrescendi.

This right of survivorship is called by our ancient authors[r] the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" And this *jus accrescendi* ought to be mutual, which I apprehend to be one reason why neither the king,[s] nor any corporation,[t] can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship, for the king and the corporation can never die.[u]

[r] Bracton, l. 4, tr. 3, c. 9, § 3. Fleta, l. 3, c. 4.

[s] Co. Litt. 190. Finch, L. 83.

[t] 2 Lev. 12.

[u] But Lord Coke says expressly, "there may be joint-tenants, though there be not equal benefit of survivorship; as if a man lets lands to A. and B. during the life of A.; if B. die, A. shall have all by survivorship; but if A. die, B. shall have nothing." (Co. Litt. 181.) The mutuality of survivorship does not therefore appear to be the reason why a corporation cannot be a joint-tenant with a private person; for two corporations cannot be joint-tenants together; but whenever a joint-estate is granted to them, they take as

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3. Severance of joint-tenancy.

3. We are, lastly, to inquire how an estate in joint-tenancy may be *severed* and *destroyed.* And this may be done by destroying any of its constituent unities. 1. That of *time,* which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession.* For joint-tenants being seised *per my et per tout,* everything that tends to narrow that interest, so that they shall not be seised throughout the whole and throughout every part, is a severance or destruction of the jointure. And, therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason, also, the right of survivorship is by such separation destroyed.[v] By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do:[w] for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now, 'by bill in equity, a partition of joint-estates may be compelled, and the statute 11 & 12 Vict. c. 99, farther provides an easy means of effecting partitions (when none of the parties for the time being interested in the lands offers opposition) through the medium of the Inclosure Commissioners.' 3. The jointure may be destroyed by destroying the unity of *title.* As if one joint-tenant aliens and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common;[x] for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other

Partition.

Alienation.

tenants in common. (Co. Litt. 190.) But there is no survivorship of a capital, or a stock in trade, among merchants and traders; for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* (Co.Litt. 182. See *post* Chap. xxv.)

[v] Co. Litt. 188, 193.

[w] Litt. § 290.

[x] Thus, by the civil law, *nemo invitus compellitur ad communionem.* (Ff. 12, 6, 26, § 4.) And again; *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest.* (Ff. 10, 3, 8.)

[y] Litt. § 292.

from the subsequent, grantor), though, till partition made, the unity of possession continues. But a devise of one's share by [186] will is no severance of the jointure: for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other)[z] is already vested.[a] 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure;[b] though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate.[c] In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure:[d] for it destroys the unity both of title and of interest, 'although if the lessee for life die in the lifetime of both joint-tenants, the jointure will revive.'[e] And whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it.[f] Yet, if one of three joint-tenants aliens his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship:[g] and, if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure,[h] for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

Merger.

[z] *Jus accrescendi præfertur ultimæ voluntati.* Co. Litt. 185.

[a] Litt. § 287.

[b] Cro. Eliz. 470.

[c] 2 Rep. 60. Co. Litt. 182.

[d] Litt. § 302, 303.

[e] Co. Litt. 193, a.

[f] *Nihil de re accrescit ei, qui nihil in re, quando jus accresceret, habet.* Co. Litt. 188.

[g] Litt. § 294.

[h] Litt. § 304. 3 A. & E. 75.

[187] In general it is advantageous for the joint-tenants to dissolve the jointure, since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint-estate; as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety.[i] And, therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture:[j] for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant by a tenant for his own life merely, is a forfeiture of his estate:[k] for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

II. Estates in coparcenary.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple, or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown, when we treat of descents hereafter; and these coheirs are then called *coparceners;* or, for brevity, *parceners* only.[l] Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c.[m] And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them.[n]

[188] The *properties* of parceners are in some respects like those of joint-tenants; they having the same unities of *interest, title,* and *possession.* They may sue and be sued jointly for matters relating to their own lands;[o] and the entry of one of them shall

[i] *Eustace* v. *Scowen,* 1 Sir W. Jones, 55.
[j] 4 Leon. 236.
[k] Co. Litt. 252.
[l] Litt. § 241, 242.
[m] Litt. § 265.
[n] Co. Litt. 163.
[o] Co. Litt. 164.

in some cases enure as the entry of them all.[p] They cannot have an action of trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste:[q] for coparceners could at all times put a stop to any waste 'by the ancient and now-abolished' writ of partition, but till the statute of Henry the Eighth[r] joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants:[s] and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man has two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners;[t] the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety;[u] and of course there is no *jus accrescendi*, or survivorship, between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, [189] they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.[v]

Parceners are so called, says Littleton,[w] because they

[p] Co. Litt. 188, 243.
[q] 2 Inst. 403.
[r] 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32.
[s] Litt. § 254.
[t] Co. Litt. 164, 174.
[u] Co. Litt. 163, 164.
[v] Litt. § 309.
[w] Litt. § 241.

Partition by coparceners.

may be constrained to make *partition*. And he mentions many methods of making it;[x] four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger.[y] And the reason given is, that the former privilege of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio.* The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion 'was formerly by suing out a writ of partition at common law; but as this writ has, with many other real writs, been abolished by statute 3 & 4 Will. IV. c. 27, partition must now be compelled by a bill in equity.'[z] But there are some things which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson.[a]

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x Litt. § 243 to 264.

y Co. Litt. 166. 3 Rep. 22. 1 Ves. Sen. 240.

z When all are agreed as to the partition, the assistance of the Inclosure Commissioners, under the stat. 11 & 12 Vict. c. 99, may if necessary be obtained as in the case of joint-tenants.

a Co. Litt. 164, 165. *Johnston* v. *Baber*. Chanc. Aug. 8, 1856.

Hotch-pot.

There is yet another consideration attending the estate in coparcenary: that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor (which we may remember was a species of estate-tail, freely given by a relation for advancement of his kinswoman in marriage), in this case, if lands descend from the *same* ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending.[b] This mode of division was known in the laws of the Lombards;[c] which direct the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing those lands into *hotch-pot*:[d] which term I shall explain in the very words of Littleton:[e] "It seemeth that this word *hotch-pot* is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us,[f] that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot. And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver,

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[b] Bracton, l. 2, c. 34. Litt. § 266 to 273.
[c] L. 2, t. 14, c. 15.
[d] Britton, c. 72.
[e] § 267.
[f] Litt. § 268.

per formam doni: it matters not, therefore, how unequal this distribution may be. Also no lands, but such as are given in frankmarriage, shall be brought into hotch-pot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion.[g] And therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotch-pot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

Dissolution of coparcenary.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

IV. Tenancy i common.

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.[h] This tenancy, therefore, happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no [192] necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

Creation of tenancy in common.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: as, if one of two joint-tenants in fee

[g] Litt. § 274, 275. Litt. § 292.

aliens his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners aliens, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because, they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten: and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.; and those too not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common. [193]

A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common;[i] because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common; and, if one grants to another *half*

Joint-tenancy favoured by law.

[i] Salk. 392. On the other hand, tenancy in common is favoured in equity (*Parteriche* v. *Powlet*, West, R. 7), which will frequently find reasons for treating as a tenancy in common that which at law is a joint-tenancy. (*Lake* v. *Craddock*. 3 P. W. 158, 159.)

his land, the grantor and grantee are also tenants in common: because, as has been before observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed that it is impossible they should take a joint-interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy;[j] because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition: and an estate given to A. and B., *equally to be divided* between them, though in *deeds* it has been said to be a joint-tenancy[k] (for it implies no more than the law has annexed to the estate, viz., divisibility[l]), yet in *wills* it is certainly a tenancy in common;[m] because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed, 'and the liberality of construction accorded to wills has been extended by modern decisions to deeds operating under the Statute of Uses.'[n] But it is the most usual as well as the safest way, when a tenancy [194] in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold *as tenants in common and not as joint tenants.*

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by bill in equity to make partition of their lands. They properly take by distinct moieties, and have no entirety of interest: and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate;[o] though, if one actually turns the other out of possession, an action of ejectment will lie

[j] Poph. 52.
[k] 1 Eq. Cas. Abr. 291.
[l] 1 P. Wms. 17.
[m] 3 Rep. 39; 1 Vern. 32. 2 Ves. Sen. 252.
[o] Co. Litt. 199.

against him.[p] But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common whose interests are distinct, and whose titles are not joint but several.[q]

Dissolution of tenancy in common.

Estates in common can only be *dissolved* two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty. 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

[p] Co. Litt. 200. 'The possession or receipt of the profits of more than his undivided share of the land by one tenant in common, *for his own benefit*, is not deemed the possession or receipt of profits by the other tenant, so that after twenty years of such possession or receipt the latter will be barred of his remedy.' (3 & 4 Will. IV. c. 27, s. 12.)

[q] 'For injuries to their common property, as trespass, or nuisance, or the recovery of anything in which they have a common right, as for rent reserved on a lease for years, they must all be parties to the action. (Com. Dig., *Abatement* (E. 10); Co. Litt. 197.) So one tenant in common cannot avow alone for taking cattle damage-feasant, but he must also make cognizance as bailiff of his companion. (2 H. Bl. 386; Sir W. Jones, Rep. 253.) If, however, the lessee of two tenants in common pay the whole of the rent to *one*, after notice from the other to pay them each a moiety, the tenant in common, who gave such notice, may distrain for his share.' (*Harrison* v. *Barnby*, 5 T. R. 246; *Powis* v. *Smith*, 5 B. & Ald. 851.)

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

[195] The foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

A title is thus defined by Sir Edward Coke, *titulus est justa causa possidendi id quod nostrum est;* or, it is the means whereby the owner of lands has the just possession of his property.

Mere possession.

The lowest kind of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death [196] of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by the appropriate legal remedies, as will more fully appear in the third book of these Commentaries. But in the meantime, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *primâ facie*, evidence of a legal title in the possessor; and it

Disseisin.

may, by length of time, and negligence of him who has the right, by degrees ripen into a perfect and indefeasible title. And at all events, without such actual possession, no title can be completely good.

Right of possession.

But to constitute a good and perfect title something more is necessary, namely, the *right of possession*, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. And formerly this right of possession was distinguished or divided into two sorts: an *apparent* right of possession, which might be defeated by proving a better; and an *actual* right of possession, which would stand the test against all opponents. Thus, if the disseisor or wrongdoer died possessed of the land whereof he so became seised by his own unlawful act, and the same descended to his heir; by the common law the heir obtained an *apparent* right, though the *actual* right of possession resided in the person disseised; and it was not lawful for the person disseised to divest this apparent right by mere entry or other act of his own, but only by an action at law: for, until the contrary was proved by legal [197] demonstration, the law presumed the right to reside in the heir, whose ancestor died seised, rather than in one who had no such presumptive evidence to urge in his own behalf: which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services; and therefore when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who had the actual right of possession, put in his claim, and brought his action within a reasonable time, and could prove by what unlawful means the ancestor became seised, he then by sentence of law recovered that possession, to which he had such actual right.

'The distinction, however, between *apparent* and *actual* right has been nullified by the statute 3 & 4 Will IV. c. 27, s. 39, which enacts that no descent cast—which is the old technical phrase to denote the passing of the property from the disseisor to his heir—shall defeat any right of entry or action for the recovery of the land. Still, if the party entitled' omits to bring his action within the time fixed by the law, which is in ordinary cases twenty years, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. 'And this right is by the statute above mentioned perfect and complete, and no further remedy remains for the party dispossessed.'

'Formerly the party thus kept out of possession was considered to have some spark of right still remaining in him, though reduced to a mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right, jus merum;* and the estate of the owner was in such cases said to be totally divested, and *put to a right.* A person in this situation might have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right was strongly in favour of his antagonist; who thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglected to pursue his remedy within the time limited by law; by this means the disseisor or his heirs gained the actual right of [198] possession; for the law presumed that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he had procured a sufficient title; and, therefore, after so long an acquiescence, the law would not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir had the true right of property remaining in himself, his estate was indeed said to be turned into a mere right: but, by proving such his better right, he might at length recover the lands. Again, if a tenant-in-tail discontinued his estate-tail, by alienating the lands to a stranger in fee, and died; here the issue in tail

had no right of *possession*, independent of the right of *property:* for the law presumed *primâ facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do: and therefore, as the ancestor had in himself the right of possession, and had transferred the same to a stranger, the law would not permit that possession to be disturbed, unless by showing the absolute right of property to reside in another person. The heir, therefore, in this case had only a *mere right*, and was strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment was given for either party in any 'of those actions which, when they existed, were called' *possessory* actions (that is, such wherein the right of possession only, and not that of property, was contested), and the other party had indeed in himself the right of property, this was turned to a *mere right;* and upon proof thereof in a subsequent real action, denominated a writ of right, he might recover his seisin of the lands. 'These possessory and real actions have however been abolished, and by section 34 of the statute 3 & 4 Will. IV. c. 27, when the time limited by that statute for making an entry or bringing a suit for the recovery of land has elapsed, the right and title itself is extinguished.'

'Previous to this alteration of the law,' if a disseisor turned me out of possession of my lands, he thereby gained what was called a *mere naked* possession, and I still retained the *right of possession* and *right of property*. If the disseisor died, and the lands descended to his son, the son gained an *apparent* right of *possession*, but I still retained the *actual* right both of *possession* and *property*. If I acquiesced for thirty years without bringing any action to recover possession of the land, the son gained the *actual right of possession*, and I retained nothing but the *mere right of property*. And even this right [199] of property failed, or at least became without remedy, unless pursued within the space of sixty years. So also if the father tenant-in-tail alienated the estate-tail to a stranger in fee, the alienee thereby gained the *right of possession*, and the son had only the *mere right of property*. And hence it followed that one man might have the *possession*, another the *right of possession*, and a third the *right of property*. For if tenant-in-tail infeoffed A. in fee-simple and died, and B. disseised A., B. thereupon had the possession, A. the right of possession,

and the issue in tail the right of property; and A. might recover the possession against B., and afterwards the issue in tail might evict A., and unite in himself the possession, the right of possession, and also the right of property, in which union consisted, according to the ancient maxim of law, a complete title to lands, tenements, and hereditaments, for not until the right of possession was joined with the right of property was a man's title completely good; but when this junction took place, he was said to have *jus duplicatum* or *droit droit.*[a] And when the actual possession was further added, there was, according to the expression of Fleta, *juris et seisinæ conjunctio*, when and when only the title was completely legal. 'The effect of the statute 3 & 4 Will. IV. c. 27, is to do away with this multiplicity of distinctions. A man may now have either the bare possession of land without the right of property, or he may have the right of property without possession, or he may have possession and right of property united. The statute which has been just mentioned, and which was passed for the "limitation of actions and suits relating to real property and for simplifying the remedies for trying rights thereto," enacts (s. 35) that at the determination of the period which it limits for making an entry, or a distress, or bringing a *quare impedit* (which is the remedy for the recovery of an advowson), or other action or suit, the *right* and *title* of the person who might within the time limited have had such remedies for the recovery of land, rent, or advowson, *shall be extinguished;* and to recover that which has ceased to have any existence, no remedy can remain. In this point the present statute differs from the earlier limitation acts, for they barred the remedies only without destroying the right. By section 39 it is enacted that no descent cast shall toll or defeat any right of entry or action for the recovery of land; so that if A. disseise B., and die while in possession, and the land descends to the heir of A., B. has still, within the period limited by the statute, the same remedy against the heir as he might have had against A. himself. The time fixed by the act (which took effect from the 1st day of January, 1834) for making an entry upon, or bringing an action to recover any land, is *twenty years* from

Effect of statute 3 & 4 Will. IV. c. 27.

Extinction of right.

[a] L. 3, c. 15, § 6. Co. Litt. 266. Bract. l. 5, tr. 3, c. 5, § 2.

the time at which the right to make such entry or bring such action first accrued to the person claiming, or to some person through whom he claims; and this right is deemed to have first accrued when the person who claims the land, or some person through whom he claims, was dispossessed of, or discontinued his possession or receipt of rent, in case he was previously in possession; or if he claims the estate or interest of some deceased person who continued in possession or receipt up to the time of his death, then the right accrues at the time of such death; or if the claim be made in respect of an interest granted or assured by some instrument (not a will) then the right accrues at the time when he became entitled by virtue of such instrument; if the interest claimed be originally a future or reversionary one, the right accrues at the time of its becoming an interest in possession; if the claim arise from a forfeiture or breach of condition, then the right accrues at the time of such forfeiture or breach taking place. A longer period than twenty years is, however, allowed when the person entitled is under disability at the time of his right accruing. Infants, women under coverture, idiots, lunatics or persons of unsound mind, and those who are abroad beyond seas, have ten years allowed them from the time of their ceasing to be under their several disabilities, for making entries or distresses, and bringing actions for the recovery of lands or rents.'

Disabilities.

'But in order to prevent the title of an actual possessor being held too long in suspense, by section 17, the extreme period of *forty years* is fixed, beyond which no person, whether under disability or no, is permitted to have any remedy, so that if a right accrue to a person under disability, who continues so during the whole forty years from the time of such accruer, he is wholly barred. And the same rule is to prevail in Equity as well as at Law (section 24), which, indeed, was practically the case before, Courts of Equity having previously considered themselves bound to follow the same rules of limitation as those which were binding at Law.'

Extreme period fixed.

'As to advowsons, being a peculiar species of property, a longer period is fixed, during which the right to them may be recovered, namely, either sixty years, or the duration of

Advowsons.

three successive incumbencies, which may be more than sixty years. But here also the extreme period of a hundred years is fixed, beyond which, although the time may have been covered by less than three incumbencies, as may very possibly happen, no remedy remains to the person claiming.'

'As a general rule, then, the possession of land by a man for twenty years, without payment of rent, or acknowledgment of the title of any other person (for such acknowledgment, if given in writing, converts his possession into the possession of the person to whom the acknowledgment is given), constitutes a sure and sufficient title. Thus where the overseer of a parish let a person into possession of a cottage, a part of the parish property, at the rent of 1*s.* 6*d.* a-week, to quit at a month's notice, and the tenant remained for twenty years without paying rent or making any acknowledgment, at the end of this time the churchwardens and overseers, for the time being, in vain brought their action of ejectment, and the title of the occupier was held good.[b] This was therefore a case in which bare possession, by effluxion of time, under the operation of the statute, had matured into a right of property, and this right, conjoined with the actual possession, constituted a complete title against all the world.'

[b] *Lansdell* v. *Gower*, 17 Q. B. 589; in which case the agreement under which the tenant was originally let into possession was held not to amount to a lease in writing within s. 8 of the Act 3 & 4 Will. IV. c. 27. See also *Doe* d. *Badeley* v. *Massey*, 17 Q. B. 373.

CHAPTER XIV.

OF TITLE BY DESCENT.

THE requirements necessary to form a complete title to lands, [200] tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners in which this complete title (and therein principally the right of *property*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors; and so, in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, the two considerations of loss and acquisition are [201] so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested

Descent and purchase.

in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement.

Descent.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.[a]

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus, a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee as have sprung or shall spring from his body; but who those heirs are, whether all his children, both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heirs; this is a point that we must result back to the standing law of descents in fee-simple to be informed of.

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In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not capable of being heirs; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents into those by *custom*,

[a] 'Formerly the title by heirship was much favoured in law; and when a man devised land to one who was his heir, the devisee was held to take by inheritance as the superior title. This rule has been altered by the recent statute, altering the law of descents, 3 & 4 Will. IV. c. 106, which enacts that when any land shall have been devised by any testator who shall die after 31st Dec., 1833, to the person who is his heir, such heir shall be considered to have acquired the land as a devisee, and not by descent.'

statute, and *common law:* for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by *statute*, or fees-tail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, 'with the recent modifications that have been made therein by the statute 3 & 4 Will. IV. c. 106,' it will now be our business to explain.[b]

'And, first, as to the rules or canons of inheritance as they existed previous to that statute, which operates upon no descent which took place previous to the first day of January 1834.'

'These canons are seven in number, and are given here, with an explanatory comment, remarking their origin and progress, and the reasons upon which they are supposed to have been founded.'

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I. Lineal descent, but no lineal ascent.

I. "Inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum;* but shall never lineally ascend."

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis.* Before that time the person who is next in the line

' In the original work of the learned author a long digression was here introduced upon consanguinity, and th doctrine of the canon and civil law r lating thereto. Mr CHRISTIAN, in h edition of the Commentaries, speaki of the canon-law computation and its connection with the law of England, says, "I do not know a single instance in which we have occasion to refer to it;" and a modern able editor (Mr. CHITTY), in a note to this part of the work, observes, "The student will do well to discard this explanation of the nature or degrees of kind ed entirely from his recollection wh reading what follows upon the canons of descent, which are not in the least dependent upon, or illustrat d by, the rules either of the civil or of the canon law, as to degrees of consanguinity. This preliminary disquisition, in fact, should have preceded the chapter on the distribution of personal estate, and is entirely out of place here." In this edition, it has been thought advisable to transfer the remarks on consanguinity to Chapter xxxii.'

of succession is called an heir apparent, or heir presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate has descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son.

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Seisin of ancestor.

'It was also formerly a rule of law,' that no person could be properly such an ancestor, as that an inheritance of lands or tenements could be derived from him, unless he had had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold: or unless he had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he was not accounted an ancestor, who had had only a bare right or title to enter or be otherwise seised. And, therefore, all the cases which will be mentioned 'as subject to the ancient canons of law,' are upon the supposition that the deceased (whose inheritance was claimed) was the last person actually seised thereof. For the law required this notoriety of possession, as evidence that the ancestor had that property in himself, which was to be transmitted to his heir. Which notoriety had succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court, and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers: till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county

(which if disputed was afterwards to be tried by those peers), or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin therefore of any person, thus understood, made him the root or stock, from which all future inheritance by right of blood was to be derived: which is very briefly expressed in this maxim, *seisina facit stipitem.*

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Lineal descent from father to son.

Under the old law, when a person died seised, the inheritance first went to his issue: as if there were Geoffrey, John, and Matthew, grandfather, father, and son; and John purchased lands, and died; his son Matthew succeeded him as heir, and not the grandfather Geoffrey: to whom the land could never ascend, but was rather allowed to escheat to the lord.

Lineal ascent excluded.

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, was peculiar to our own laws, and such as have been deduced from the same origin. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother. And by the laws of Rome, in the first place, the children or lineal descendants were preferred; and on failure of these, the father or mother or lineal ascendants succeeded together with the brethren and sisters;[c] though by the law of the twelve tables the mother was originally, on account of her sex, excluded.[d]

This rule of our ancient law has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice; 'and, as we shall see afterwards, has been altered by the recent statute.' But that it was founded upon very good legal reasons may appear from con-

[c] Ff. 38, 15, 1. Nov. 118, 127.

[d] Inst. 3, 3, 1.

sidering as well the nature of the rule itself, as the occasion [211] of introducing it into our law. We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor; after which the land by the law of nature would again become common and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law, that *successionis feudi talis est natura, quod ascendentes non succedunt;* and the same maxim obtained also in the French law 'until the end of the last century.' Our Henry the First indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line:[e] but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law,[f] that *hæreditas nunquam ascendit.* These circumstances evidently show this rule to be of feudal origin; and taken in that light, there are some arguments in its favour, besides [212] those which are drawn merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum,* or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum,* or one descended from his mother; and then, for other reasons

[e] LL. Hen. I. c. 70. 1 Thorpe 574.

[f] L. 7, c. 1.

(which will appear hereafter), the father could in nowise inherit it. And if it were *feudum novum,* or one newly-acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitutions; which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum,* or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum* or strictly *antiquum,* or whether it was *novum* held *ut antiquum,* in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton,[g] adopted by Sir Edward Coke,[h] which regulates the descent of lands according to the laws of gravitation. 'But, however ingenious and satisfactory these reasons may appear, there was little consistency in the application of them; for if the father did not succeed to the estate, because it was presumed that it had passed him in the course of descent, the same reason should have prevented an elder brother from taking an estate by descent from the younger. And if it did not pass to the father, lest the lord should be attended by an aged decrepit feudatory, the same principle would have excluded the father's eldest brother from the inheritance. In truth, the rule was one of the arbitrary creations of our feudal policy, and as we shall presently see, has no longer any operation in descents which have taken or shall take place after 31st December, 1833.'

II. "The male issue shall be admitted before the female."

II. Males preferred to females.

[g] *Descendit itaque jus, quasi ponderosum quid, cadens deorsum rectâ lineâ, et nunquam reascendit eâ viâ quâ descendit.* L. 2, c. 29.

[h] 1 Inst. 11.

[213] Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred.[i] As if John Stiles had two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

This preference of males to females is entirely agreeable to the law of succession among the Jews, and also among the states of Greece, or at least among the Athenians;[j] but was totally unknown to the laws of Rome[k] (such of them I mean as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex: but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males,[l] yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance.[m] But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of King Canute) gives an evident preference of the male to the female sex. *Pater aut mater, defuncti, filio non filiæ hæreditatem relinquent. . . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat.*[n] It is possible, therefore, that this preference might be a branch of that imperfect system of feuds, which obtained here before the [214] conquest: especially as it subsists among the customs of gavelkind, and as, in the charter or laws of King Henry the First, it is not (like many Norman innovations) given up, but rather enforced.[o] The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever

[i] Hal. H. C. L. 235.
[j] Petit. LL. Attic. 1, 6, t. 6.
[k] Inst. 3, 1, 6.
[l] Stat. Wall. 12 Edw. I.
[m] LL. Canut. c. 73. 1 Thorpe, 415.
[n] Tit. 7, §§ 1 & 4.
[o] C. 70. 1 Thorpe, 575.

succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations; our law, like that of the Saxon feudists before mentioned, thus steering a middle course between the absolute rejection of females, and the putting them on a footing with males.

III. Primogeniture and coparcenary.

III. "Where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together."

As if a man had two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.

This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance;[p] in the same manner as with us, by the laws of King Henry the First,[q] the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary.[r] The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible, or (as they styled them) *feuda individua*, and in consequence descendible to

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[p] Selden, De Succ. Ebr. c. 5. [q] C. 70. [r] Glanvil, l. 7, c. 3.

the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments.[s] These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the Conqueror.

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil[t] wrote in the reign of Henry the Second; and it is mentioned in the Mirror,[u] as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the Third's time, we find by Bracton,[v] that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law [216] now stands: except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons; and except in some particular manors and townships, where their local customs continued their descent sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

Descent to all the females.

As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took

[s] Hale, H. C. L. 221.
[t] L. 7, c. 3.
[u] C. 1, § 3.
[v] L. 2, c. 30, 31, 34.

place as to the inheritance of the crown;[w] wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For, if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the Crown shall declare its pleasure; for the Sovereign being the fountain of honour, may confer it on which of them he pleases.[x] In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—"*progressum est, ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare.*"

IV. Lineal descendants represent their ancestor.

IV. "The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done, had he been living."

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Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so *in infinitum*.[y] And these representatives shall take neither more nor less, but just so much as their principals would have done. As, if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one a piece.

Succession *per stirpes*.

This taking by representation is called succession *per stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish

[w] Co. Litt. 165. [x] Co. Litt. 165. [y] Hale, H. C. L. 236, 237.

succession directed;[z] but the Roman somewhat differed from it. In the descending line, the right of representation continued *in infinitum*, and the inheritance still descended *per stirpes:* as, if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as, if the deceased left one brother, and two nephews, the sons of another brother), the succession was still guided by the roots: but, if both the brethren were dead leaving issue, then (I apprehend) their representatives in equal [218] degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation.[a] So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both which the Roman law is a stranger. For, if all the children of three sisters were in England to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first-born, among persons in equal degree.

[z] Selden, De Succ. Ebr. c. 1.

[a] Nov. 118, c. 3; Inst. 3, 1, 6.

Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As, if a man had two sons, A. and B., and A. dies leaving two sons, and then the grandfather dies; now [219] the eldest son of A. shall succeed to the whole of his grandfather's estate: and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But, if a man has only three daughters, C., D., and E.; and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C. shall succeed to one third, in exclusion of the younger; the two daughters of D. to another third in partnership; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the Second, when Glanvil wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also, was usually better able to perform the services of the fief; and besides had frequently superior interest and strength, to back his pretensions and crush the right of his nephew. Yet Glanvil, with us, even in the twelfth century, seems[b] to declare for

b L. 7, c. 3.

the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been foris-[220] familiated, in his lifetime. King John, however, who kept his nephew Arthur from the throne, by disputing his right of representation, did all in his power to abolish it throughout the realm:[c] but in the time of his son, King Henry the Third, we find the rule indisputably settled in the manner we have here laid it down,[d] and so it has continued ever since. And thus much for lineal descents.

V. Collateral descent.

V. A fifth rule 'of our ancient law (still affecting descents that took place prior to 1st January, 1834') is that, on failure of lineal descendants or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

Thus, 'if previous to 1st January, 1834,' Geoffrey Stiles purchased land, and it descended to John Stiles his son, and John died seised thereof without issue; whoever succeeded to this inheritance must have been of the blood of Geoffrey the first purchaser of this family. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar origin. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy[e] agreed with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both was of feudal origin; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally

[c] Hale, H. C. L. 217, 229. [d] Bracton, l. 2, c. 30, § 2.
[e] Gr. Coustum, c. 25.

descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. The true feudal reason for which rule was this: that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled), so in the feudal donation, "*nomen hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*:"[f] the will of the donor, or original lord (when feuds were turned from life estates into inheritances), not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo;* not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

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Feudum novum.

However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum;* that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is descended from, the first imaginary purchaser. For, since it was not ascertained in such general grants, whether this feud should be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, since it was not ascertained from which of the ancestors of the grantee this feud should be supposed to have descended; the law would not ascertain it, but supposed *any* of his ancestors, *pro re natâ*, to have been the first purchaser: and therefore it admitted *any* of his collateral

Feudum novum ut antiquum.

[222]

[f] Craig, l. 1, t. 9, § 36.

kindred to the inheritance, because every collateral kinsman must have been descended from some one of his lineal ancestors.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum;* unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and hence the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are regarded as capable of being called to the inheritance.

Yet, when an estate has really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance has passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and, *vice versâ*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles, the relations of his father's mother, Cecilia Kempe, shall for the same reason [223] never be admitted, but only those of his father's father. This was also the rule of the old French law,[g] which is derived from the same feudal fountain.

Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as, if it be not known whether his grandfather, George Stiles, inherited it

[g] Domat. part 2, pr.

from his father, Walter Stiles, or his mother, Christian Smith; or, if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate: because, in the first case, it is really uncertain, and, in the second case, it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the Year-books,[h] Fitzherbert,[i] Brook,[j] and Hale,[k] "that he who would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim, that formerly held universally, except in the case of a brother or sister of the half blood.

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VI. Collateral heir next collateral kinsman of whole blood.

VI. A sixth rule or canon 'affecting descents that took place prior to 1st January, 1834,' is that "The collateral heir of the person last seised must be his next collateral kinsman, of the whole blood."

[225]

The former part of this rule implies, that, on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance

[h] M. 12 Edw. IV. 14.
[i] Abr. t. *Discent*, 2.
[j] Abr. t. *Discent*, 38.
[k] H. C. L. 243.

among the antient Germans, our progenitors: "*hæredes successoresque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi.*"[l]

[226] Now here, it must be observed, that the lineal ancestors though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore, in the Jewish law, which in this respect entirely corresponds with ours, the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c., but in right of representation, as the offspring of the father, grandfather, &c. of the deceased.[m] But, though the common ancestor, 'under the old law, was considered as the' root of the inheritance, yet it was not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers was held to be an *immediate* descent; and therefore title might be made by one brother or his representatives *to* or *through* another, without mentioning their common father.[n] If Geoffrey Stiles had two sons, John and Francis, Francis might claim as heir to John without naming their father Geoffrey; and so the son of Francis might claim as cousin and heir to Matthew the son of John, without naming the grandfather; *viz.* as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors were not named in deducing the pedigree, yet the law still respected them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of John Stiles, it was first necessary to recur to his ancestors in the first degree; and, if they had left any other issue besides John, that issue was his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards, *in infinitum;* till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these

[l] Tacitus, De Mor. Germ. 21.

[m] Selden, De Succ. Ebr. c. 12.

[n] 1 Sid. 196; 1 Ventr. 423; 1 Lev. 60; 12 Mod. 619.

ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, primogeniture, and representation, that have [227] before been laid down with regard to lineal descents from the person of the last proprietor.

Exclusion of half blood by old law.

'Under the old law it was not necessary that' the heir should be the nearest kinsman absolutely, but only *sub modo;* that is, he must have been the nearest kinsman of the *whole* blood; for if there were a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood was admitted, and the other entirely excluded; nay, the estate was allowed to escheat to the lord, sooner than the half blood should inherit.

Who is of the whole blood.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who has (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other has. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, has entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and has issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (it is true), on the one part, but that of Lewis Gay (instead of Geoffrey Stiles), on the other part, it has therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they could never inherit to each other. So also, if the father has two sons, A. and B., by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore, 'said the old law,' shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised without issue; still B., 'said the old law,' shall not be heir to this estate, because he is only of the half blood to A., the person last seised: but it shall descend to a sister (if any) of the whole blood to A.: for, in

[228] such cases, the maxim is, that the seisin or *possessio fratris facit sororem esse hæredem.* Yet, had A. died without entry, then B. might have inherited; not as heir to A. his half brother, but as heir to their common father, who was the person last actually seised.

Reasons for exclusion of half-blood.

This total exclusion of the half blood from the inheritance, being almost peculiar to our law, has been looked upon as a strange hardship, 'and the rule, as we shall see afterwards, has been altered. The rule itself, while it was in operation, was' not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. The great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; then the law substituted what Sir Martin Wright[o] calls a *reasonable*, in the stead of an *impossible*, proof: for it remitted the proof of an actual descent from the first purchaser; and only required in lieu of it, that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of ancestors), which would probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versâ* his: he therefore is very likely to be derived from that unknown ancestor of mine from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite of the 'old' law, that he be derived from the blood of the first purchaser.

[o] Tenures, 185.

To illustrate this by example. Let there be John Stiles, [229] and Francis, brothers by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John died seised of lands, but it was uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, was qualified to be his heir; for he was sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But, if Francis died before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) was utterly incapable of being heir; for he could not prove his descent from the first purchaser, who was unknown, nor had he that fair probability which the law admits as presumptive evidence, since he was to the full as likely *not to be* descended from the line of the first purchaser, as *to be* descended; and therefore the inheritance went to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this was the case *in feudis antiquis*, where there really did once exist a purchasing ancestor, who was forgotten; it was also the case *in feudis novis* held *ut antiquis*, where the purchasing ancestor was merely ideal, and never existed but only in fiction of law. All modern grants of lands in fee-simple were therefore inheritable, as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) might inherit them, provided they were of the whole blood; for all such were, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood were excluded, for want of the same probability. It was considered to be no real hardship, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it was only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) were entitled to inherit at all; for we have seen that, *in feudis stricte novis*, neither brethren nor any other collaterals [230] were admitted. As therefore *in feudis antiquis* there was reason for excluding the half blood, so when by a fiction of law a *feudum novum* was made descendible to collaterals as if

it was *feudum antiquum*, it was thought just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps on these grounds the exclusion of the half blood may appear to have been not altogether so unreasonable as at first sight it is apt to do. It was certainly a very fine-spun and subtle nicety, but considering the principles upon which our law is founded, it was not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence was not extended to the demi-kindred, yet they were rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answered, for the most part, effectually enough. It is right to speak with these restrictions, because it did not, neither can any other method answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet unless that common stock be in the first degree (that is, unless they have the same father and mother), there will be intermediate ancestors, below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher (that is, the grandfather and grandmother), one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors: nor his *avunculus*, or mother's brother, [231] from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty: and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an

unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stilès is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great-uncle of the whole blood, but they are seven to one against his great-uncle of the half blood, for seven-eighths of John's ancestors have no connexion in blood with him. Therefore, the much less probability of the half blood's descent from the first purchaser, compared with that of the whole blood in the several degrees, occasioned, 'by the old law,' a general exclusion of the half blood in all.

But, while the reason of excluding the half blood in general is thus illustrated, it must be impartially owned, that, in some instances, the practice was carried farther than the principle upon which it goes warranted. Particularly when a kinsman of the whole blood in a remoter degree, as the uncle or great-uncle, was preferred to one of the half blood in a nearer degree, as the brother; for the half-brother had the same chance of being descended from the purchasing ancestor as the uncle; and a thrice-better chance than the great-uncle or kinsmen in the third degree. It was also more especially overstrained, when a man had two sons by different venters, and the estate on his death descended from him to the eldest, who entered and died without issue; in which case the younger son could not inherit this estate, because he was not of the whole blood to the last proprietor. This, it must be owned, carried a hardship with it, even upon [232] feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it was demonstrable that the half-brother was of the blood of the first purchaser, who was either the father or some of the father's ancestors. When, therefore, there was actual demonstration of the thing to be proved, it was hard to exclude a

man by a rule substituted to supply that proof when deficient. So far as the inheritance could be evidently traced back, there seemed no need of calling in this presumptive proof, this rule of probability, to investigate what was already certain. Had the elder brother indeed been a purchaser, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

Indeed, it is this very instance of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre*, that Craig[p] has singled out on which to ground his strictures on the ancient rule of the English law excluding the half blood. And, really, it should seem as if originally the custom of excluding the half blood in Normandy[r] extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versâ*, and possibly in England also; as even with us it remained a doubt, in the time of Bracton,[s] and of Fleta,[t] whether the half blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands. So also the rule of law, as laid [233] down by our Fortescue,[u] extends no farther than this: *frater fratri uterino non succedet in hæreditate paternâ.* It is, moreover, worthy of observation, that by our law, as it has long stood, the Crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign,[v] so that it be the blood of the first monarch purchaser, or (in the feudal language) conqueror of the reigning family. Thus it actually did descend from King Edward the Sixth to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly King William the Norman, and is now the Princess Sophia of Hanover. Hence also

q L. 2, t. 15, § 14.
r Gr. Coustum. c. 25.
s L. 2, c. 30, § 3.
t L. 6, c. 1, § 14,
u De Laud. LL. Angl. 5.
v Plowd. 245; Co. Litt. 15.

it is that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent: because, when the lineage is clearly made out, there is no need of this auxiliary proof. 'But any discussion of this subject would now seem to be almost profitless, unless as matter of legal history, since the rule excluding the half blood has now (by the statute 3 & 4 Will. IV. c. 206) no operation in descents which have taken place since the 31st December, 1833.'

VII. Preference of paternal line to maternal.

VII. The seventh rule or canon is that "In collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near),—unless where the lands have, in fact, descended from a female."

[234]

In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards, the descendants of all which respective couples are (representatively) related to him in the same degree. Thus, in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Francis Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which, therefore, of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness*, of blood. 'Hence the rule above mentioned, giving the preference to the paternal over the maternal line.'

For the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at

all;[w] and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden,[x] and Petit;[y] though among the Greeks, at the time of Hesiod,[z] when a man died without wife or children, all his kindred [235] (without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati* or relations by the mother, till the Emperor Justinian[a] abolished all distinction between them. It is also conformable to the ancient customary law of Normandy,[b] which indeed in most respects agreed with our English law of inheritance.

However, I am inclined to think, that this rule of our law does not owe its immediate origin to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchaser. For, when such first purchaser was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession, but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchaser to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than from the father's mother; and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchaser: a conduct much more rational than the preference of *agnati*, by the Roman laws; which, as

[w] Litt. § 4.
[x] De Succ. Ebræor. c. 12.
[y] LL. Attic. l. 1, t. 6.
[z] Θεογον. 606.
[a] Nov. 118.
[b] Gr. Coustum, c. 25.

they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one; upon which account this preference was very wisely abolished by Justinian.

[236] That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland, the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*), here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors; but upon failure of issue there, they might possibly be found among those derived from the females.

This I take to have been the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser: but as males have not been *perpetually admitted*, but only *generally pre-* [237]

ferred; as females have not been *utterly excluded,* but only *generally postponed* to males; the tracing the inheritance up through the male stocks gave not absolute demonstration, but only a strong probability, of arriving at the first purchaser; which, joined with the other probability, of the wholeness or entirety of blood, 'might be considered to' fall little short of certainty.

'Having thus stated the law of inheritance as it stood previous to the 1st day of January, 1834, we have now to consider the operation of the statute 3 & 4 Will. IV. c. 106.'[c]

'The first rule laid down by that statute is as follows (sec. 2):—"In every case descent shall be traced from *the purchaser;* and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, *the person last entitled* to the land shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner, the last person from whom the land shall be proved to have been inherited shall, in every case, be considered to have been the purchaser, unless it shall be proved that he inherited the same." By the 1st section or interpretation clause of the statute, "*the purchaser*" is defined to be "the person who last acquired the land otherwise than by descent, or than by an escheat or partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent." "The person *last entitled* to the land," extends also to "the last person *who had a right thereto,*" whether he did or did not obtain the possession or the receipt of the rents and profits thereof.

'The 2nd section, therefore, annuls the old maxim *seisina facit stipitem,* and henceforward the first question, which arises upon any descent, is not who was last *seised* of the land, but who was last *entitled* thereto. On the other hand, the old

[c] 'This statute was passed in pursuance of the suggestions made by the Commissioners appointed to report on the law of real property; which suggestions, it is proper to add, were not completely carried out.'

principle, which assumed that the person last seised became entitled by descent, and that though he might actually have purchased the fee, yet that he held it *ut feodum antiquum*, is discarded, and the last possessor is looked upon as the first purchaser, unless it be proved that he actually took by descent. When such descent is proved, and an actual first purchaser is arrived at, such first purchaser becomes the stock of the descent, and it is for his heir that we must inquire. This rule has introduced one inconvenient consequence, which could not have arisen under the old law.[d] It may happen that, through failure of heirs of the first purchaser, an estate may escheat to the crown, instead of going to persons of the blood of him who was last entitled. In 1808, an illegitimate person purchased lands, which on his death, in 1815, descended to his only son. The son died in 1834, seised of the property and intestate. Upon his death the lands were claimed by the person who would have been his heir on the mother's side, supposing, under the old rule of law, the father's side to have been exhausted. It was held, however, that as, under the new law, it was necessary to trace heirship from the father as purchaser, and as the father, having been illegitimate, was necessarily without collateral heirs, the estate must escheat.[e]'

'The next alteration which the statute has made in the

[d] And which would not have occurred had the legislature adopted the suggestion of the Real Property Commissioners by enacting "that estates shall pass to the heirs of the person who last died entitled, although he may not have had seisin."

[e] *Doe* d. *Blackburn* v. *Blackburn*, 1 Mood. & Rob. 547. Another inconvenience was apprehended from the operation of this section as likely to arise under the following circumstances: – Suppose A. to have purchased an estate, and to have died intestate, leaving three daughters, Mary, Jane, and Sarah. Each of them takes one-third of the land by descent. Mary, subsequently to Dec. 31, 1834, dies, leaving a son, who, under the old law, if Mary or either of her sisters had acquired seisin, would have succeeded to his mother's whole share. But under the new law in this case we must look for the heir of A. the purchaser, not of Mary the person last entitled; and as A.'s heirs are now Jane, Sarah, and the son of Mary, as representing his mother, it seems to follow that Mary's third becomes again divisible into thirds, one of which only goes to her son, the other two descending to Jane and Sarah. Such a case actually arose in 1839, and it was decided by Sir L. Shadwell, V.C., that the son inherited his mother's whole share, it being, his Honour observed, the purview of the 2nd section, "that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require." And thus it seems that when a person dies leaving issue, it is not necessary to make any inquiry as to the previous descent of the lands, or who was the first purchaser, but we must look for the heir among such issue.—(*Cooper* v. *France*. 19 L. J. Chanc. 313. See also *Paterson* v. *Mills*, ibid.)

ancient principles of inheritance is (sect. 3), that lands devised by a testator dying after the 31st December, 1833, to the person who is his heir, shall be considered to vest in such person, by virtue of the devise, and not, as under the old law, by the superior title of descent,—so that the devisee becomes a purchaser and the stock of descent. The same effect is produced when a person entitled to land by descent, by any assurance executed after the 31st December, 1833, limits the land to himself or his heirs. He now becomes a purchaser by virtue of such assurance, and is not "in of his former estate," as he would have been under the old law. Also, by sec. 4, if by any assurance executed after the 31st December, 1833, or by the will of a testator who dies after that day, lands are limited to the heir or the heirs of the body of an ancestor of the person, who in the event becomes entitled under such limitation, the descent of the land from that person shall be traced as though the ancestor named had been the purchaser.'

'We have seen that under the old law a brother or sister was considered to have inherited *immediately* from a brother or sister, and in tracing the descent the common ancestor need not have been named.[f] By the fifth section of the statute this rule is reversed, and every descent from a brother or sister must now be traced through the parent.'

'This brings us to the consideration of one of the most important alterations effected in the ancient law of inheritance, that which provides that a father or other lineal ancestor may succeed to his son or other lineal descendant. The theory of the old law, which assumed in all cases title by descent in preference to title by purchase, inexorably forbade this, for land could not by possibility ascend to him, by whose death it must be supposed to have previously descended. But now that the first purchaser is no longer to be considered lost in remote antiquity, but is to be looked for as near to the present time as possible, and when found is to become the root of descent, it is no longer inconsistent that a father should inherit from his son; and accordingly the sixth section of the statute enacts, "that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall

[f] *Ante*, p. 214.

be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue." '

'In order to keep the estate in the line from which it was most *likely* to have really descended, the old law directed that in collateral inheritances the male stocks should be preferred to the female, unless where the estate had actually descended in the maternal line. The new law (section 7) conforms to this rule, although the principle upon which it is alleged to have been grounded has ceased to have any application. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, are now capable of inheriting, until all his paternal ancestors, and their descendants, shall have failed; and no female paternal ancestor of such person, nor any of her descendants, is capable of inheriting, until all his male paternal ancestors, and their descendants, shall have failed; and no female maternal ancestor of such person, nor any of her descendants, is capable of inheriting, until all his male maternal ancestors and their descendants shall have failed.'

'It was a question mooted under the old law (and the arguments on one side and the other are stated at length in the previous editions of these Commentaries), whether upon failure of collateral heirs traceable through any of the male paternal ancestors, in which case it became necessary to resort to the female paternal ancestry, collaterals traced through the paternal grandmother, should or should not have preference to those traced through the paternal grandfather's mother;—the former being No. 11 in the table of descents according to the old law, the latter No. 10. The question actually arose, and was decided in favour of No. 10.[s] And the recent statute has adopted the decision, and extended its application to the present state of the law by enacting (section 8), that when there shall be a failure of male paternal ancestors of the persons from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal

[s] *Davies* v. *Lowndes*, 7 Scott, 22, 56.

ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor or her descendants; and when there shall be a failure of male maternal ancestors of such persons and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor and her descendants.'

'The arguments in favour of the exclusion of relations of the half blood, must have been always seen to have little cogency, and when this doctrine was carried to the length of producing escheat, it was felt to be doubly odious and absurd. The rule laid down by the new law is consistent with the popular feeling of what is right and equitable. It is enacted (section 9), that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, when the common ancestor shall be a male, and next after the common ancestor when the common ancestor shall be a female, so that the brother of the half blood, on the part of the father, shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.'

'Such are the enactments by which the ancient law of inheritance and the rules for tracing descent have been modified. As the result of what has gone before, the following canons may be stated as those by which inheritances taking place subsequently to the 31st day of December, 1833, are governed.'

I. 'The descent shall be traced from the purchaser, the person last entitled to the land being considered to have been the purchaser, unless he be proved to have inherited it.'

'This rule it appears, is not to be applied unless the circumstances of the case and the nature of the title require it, so that when a person dies *leaving issue*, it need not be inquired whether he or she took by inheritance or by purchase.[h]'

[h] See note, p. 225. *Cooper* v. *France*. 19 L. J. Chanc. 313.

II. 'Inheritances shall descend lineally to the issue of the purchaser.'

III. 'On failure of issue of the purchaser, the inheritance shall go to his nearest lineal ancestor or the issue of such ancestor, the ancestor taking in preference to his or her issue. Thus, if the purchaser dies without issue, the father takes before the brothers or sisters of that purchaser; and a grandfather, not before the father or the father's issue, but before the uncles or aunts or their issue.'

IV. 'Paternal ancestors and their descendants shall be preferred to maternal ancestors and their descendants, male paternal ancestors and their descendants to female paternal ancestors and their descendants, and male maternal ancestors and their descendants to female maternal ancestors and their descendants, and the mother of a more remote female ancestor on either side and her descendants to the mother of a less remote female ancestor and her descendants.[1] Thus the mother of the paternal grandfather, and her issue, shall be referred to the father's mother and her issue.'

V. 'The male issue shall be admitted before the female.'

VI. 'When there are two or more males in equal degree, the eldest only shall inherit, but the females all together.'

VII. 'Relations of the half-blood shall be capable of inheriting; those who are related *ex parte paternâ*, taking next in order to the relations male and female of the same degree of the whole blood; those who are related *ex parte maternâ*, taking next in order after their mother.'

VIII. 'The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living. Thus the issue of a deceased eldest son, in whatever degree, will precede in order of inheritance, the living younger sons.'

'Before we conclude this branch of our inquiry, it may not be amiss to exemplify the two sets of rules which have been

[1] This canon combines the two principles laid down in ss. 7 & 8 of the statute, which are explained at length *ante*, pp. 227, 228.

laid down, by examples showing first, how the heir of a person, as John Stiles, who died seised was to be searched for as the law formerly stood, and next, what the process is under the law as now altered.'

[237] 1. Let John Stiles have died, previous to January 1834, seised of land which he acquired, and which he therefore held as a feud of indefinite antiquity.[j] In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. 1.)—if this line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (No. 2.)—in default of these all the daughters together, Margaret and Charlotte Stiles, or their issue: (No. 3.)—On failure of the descendants of *John Stiles* himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue: (No. 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (No. 5.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue: (No. 6.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (No. 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (No. 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (No. 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum.* In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum:* till both the immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of [238] Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (No. 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. 12.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum.*—In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal

[j] See Table of Descents, *ante* No. I. p. 197.

grandmother's mother: (No. 13.)—and so on in the paternal grandmother's maternal line, or blood of Francis Holland, *in infinitum;* till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers (Nos. 14, 15, 16), Willis's (No. 17), Thorpe's (Nos. 18, 19), and White's (No. 20), in the same regular successive order as in the paternal line.

[240] In case *John Stiles* was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, could never have inherited: as was formerly fully explained. And the like rule, as is there exemplified, held upon descents from any other ancestors.

2. 'Let us now suppose John Stiles to have died subsequently to December 31st, 1833, and entitled to an estate by purchase, that is by any other mode than descent.'[k]

'In the first place succeeds Matthew Stiles, the eldest son, or his issue (1). If his line be extinct, then Gilbert Stiles, the second son, and his issue (2.) There being no sons, nor issue of them, then all the daughters together, Margaret and Charlotte Stiles, or their issue (3). If there be no issue of John Stiles, then the inheritance goes to his father, if alive, Geoffrey Stiles (4). In default of him, to his issue, the purchaser's collateral kinsmen, namely, Francis Stiles (5), the eldest brother of the whole blood, to Oliver Stiles (6) and other brothers of the whole blood; in default of these, to the sisters of John Stiles of the whole blood, Bridget and Alice Stiles together (7), or their issue. If no issue of Geoffrey Stiles be of the whole blood to John, then comes in his brother William Stiles (8) of the half blood, or in default of him, Jane and Mary Stiles (9) sisters to John of the half blood, together with their issue. In default of all issue of Geoffrey Stiles, we come next to George Stiles (10) the grandfather, who will take if alive, or if he be not, then we have recourse to his issue (11), who will be the uncles and aunts

k See Table of Descents annexed, No. II.

of the purchaser, those of the whole blood first, and then those of the half blood. And thus we go backwards to each preceding paternal ancestor, if necessary, *ad infinitum*, observing that, when we are at last reduced to let in a female ancestor, we take the one the farthest back possible, namely, Anne Godfrey (18), who comes in before the nearer ancestress, Christiana Stiles (19). On failure of heirs of Anne Godfrey, resort will be had to Christiana Smith, the paternal grandfather's mother (19), and then to her issue of the half blood (20); in default thereof, to her father, William Smith (21), and his issue (22); in default thereof, to their mother, Jane Smith (23), and so on until the blood of both the parents of George Stiles the paternal grandfather is exhausted. We next come to Cecilia Kempe (24) the paternal grandmother, then to her issue of the half blood (25) if any, and then exhaust the blood of her parents in precisely the same course as was followed with the paternal grandfather's mother, and as indicated by the numbers 26 to 36 in the table. The blood of Cecilia Kempe failing, we have exhausted the whole paternal blood of John Stiles the purchaser, and must have recourse to his mother, Lucy Baker (37), then next her issue of the half blood (38), and then her ancestors on both sides and their issue, in precisely the same course as has been before followed on the paternal side, and as indicated in the table by the numbers 40 to 66.'

'It may be observed that the *general rules* for tracing descents laid down by the stat. 3 & 4 Will. IV., c. 106, apply to lands both of freehold and copyhold tenure, and whether descendible according to the common law or according to the custom of gavelkind or borough-english, or any other custom. But the peculiarities of descent which belong to gavelkind, borough-english, and other customary tenures, are not interfered with. Thus the rule of gavelkind tenure by which all the sons take in equal shares remains unaltered, but the new canon of descent, which enables a father of the purchaser to inherit in preference to the uncles, holds equally in this species of tenure,—as also the rule admitting kindred of the half blood.'

CHAPTER XV.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, *perquisitio*, taken in its largest and most extensive [241] sense, is thus defined by Littleton: the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person not by his own act or agreement, but by the single operation of law.[a]

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchaser; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. And if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descent would direct, such heir shall take by purchase.[b] 'It was the fact of such devise being with limitations, or in a shape other than the course of descent directed, that caused the heir to take by purchase; for,' if a man, seised in fee, devised his whole estate to his heir at law, so that the heir took neither a greater nor a less estate by the devise than he would have [242] done without it, he was adjudged to take by descent, even though it were charged with incumbrances; this being 'under

[a] Co. Litt. 18. [b] Lord Raym. 728.

the old state of the law' for the benefit of creditors, and others, who might have demands on the estate of the ancestor. 'But the distinction just pointed out no longer exists, for by statute 3 & 4 Will. IV. c. 106, s. 3, when any land has been devised by any testator dying after Dec. 31st, 1833, to his heir, such heir shall be considered to have acquired the land by purchase and not by descent.'

If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers.[c] But if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*.[d] And, if A. dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes anything that might have vested in the ancestor, he takes by way of descent.[e] The ancestor, during his life, bears in himself all his heirs;[f] and therefore when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself, and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seigniory, arising from a descent to the heir.

Rule in Shelley's case.

What we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquaestus*, or *conquisitio*:[g] both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland;[h] as it was among the Norman jurists, who styled the first purchaser (that is, he who brought the estate into the

Conquest.

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c 1 Roll. Abr. 627.
d 1 Rep. 104; 2 Lev. 60; Raym. 334.
e Shelley's case, 1 Rep. 98.
f Co. Litt. 22.
g Craig, l. 1, t. 10, § 18.
h Dalrymple, of Feuds, 210.

family which at present owns it) the conqueror or *conquereur*.[i] Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquaestus*, and himself *conquaestor* or *conquisitor*;[j] signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had.

Difference of effect of descent and purchase.

The difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side; but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will.[k] For, if the ancestor, by any deed, obligation, covenant, or the like, binds himself and his heirs, and dies; this deed, obligation, or covenant shall be binding upon the heir, so far forth only as he (or any other in trust for him)[l] had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to) that ancestor, sufficient to answer the charge;[m] whether he remains in possession, or has aliened it before action brought;[n]

[i] Gr. Coustum. Gloss. c. 25, p. 40.

[j] Spelm. Gloss. 145

[k] 'Under s 4 of the stat. 3 & 4 Will. IV. s. 106, an estate, limited to the heirs of A., descends as though A. had been the first purchaser; but in such a case the heir of A., in whom the estate of A. vests, will not be answerable for A.'s debts, as if he had assets by descent'

[l] Stat. 29 Car. II. c. 3, §§ 10, 12.

[m] 1 P. Wms. 777.

[n] Stat. 3 & 4 W. & M. c. 14.

[244] which sufficient estate is in the law called *assets;* from the French word *assez*, enough.[o] Therefore, if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent.[p]

Modes of acquiring by purchase.

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. Escheat.

I. Escheat, we may remember, was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman,[q] in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.[r]

Escheat, therefore, being a title frequently vested in the lord by inheritance, as being the fruit of a seigniory, to which he was entitled by descent (for which reason the lands escheating shall attend the seigniory, and be inheritable by such only of his heirs as are capable of inheriting the other),[s] it may seem in such cases to fall more properly under the former general head of acquiring title to estates, viz., by descent (being vested in him by act of law, and not by his [245] own act or agreement), than under the present by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, either by *entering* on the lands so escheated, 'or by bringing an action of ejectment, the modern substitute for the old writ of escheat:'[t] on failure of which, or by

[o] Finch, Law, 119.
[p] Finch, Rep. 86.
[q] *Eschet*, from *échoir*, to happen.
[r] 1 Feud. 86; Co. Litt. 13.
[s] Co. Litt. 13.
[t] Bro. Abr. tit. *Escheat*, 26.

doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred.[u] It is, therefore, in some respect a title acquired by his own act, as well as by act of law. Indeed, this was formerly true of descents themselves, in which an entry or other seisin was required, in order to make a complete title; and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the seigniory to which they belong, they may vest by either purchase or descent, according as the seigniory is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant,[v] and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus haeres*, and therefore taking by descent in a kind of caducary succession.

The law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom, or by those whose estate he has, it was given.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis:* the one sort, if the tenant dies without heirs; the other, if his blood be attainted.[w] But both these species may well be comprehended under the first denomination only; for he that is [246] attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta,[x] "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

[u] Bro. Abr. tit. *Acceptance*, 25.
[v] 1 Inst. 215.
[w] Co. Litt. 13, 92.
[x] L. 6, c. 1.

Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

Failure of hereditary blood.

1, 2. The first two cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended. 'Formerly the same happened when he died without any relations of the whole blood.' In these cases the blood of the first purchaser is at an end; and, therefore, the law directs, that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands who is not of the blood of the first feudatory, to whom, for his personal merit, the estate is supposed to have been granted.[y]

Monsters.

3. A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it [247] hath deformity in any part of its body, yet, if it hath human shape, it may be heir.[z] This is a very ancient rule in the law of England;[a] and its reason is too obvious, and too shocking,

[y] 'Formerly, upon the death without heirs, or the attainder of treason or felony of a person holding lands as a trustee, such lands escheated or were forfeited to the lord discharged of the trust. This injustice has been partially remedied in certain cases by different Acts of Parliament; but now a complete remedy has been afforded by the Trustee Act, 1850, which enables the Court of Chancery, when a trustee dies without an heir, to make an order vesting the land in some person in his place, and which further enacts that no property whatever, whether real or personal, shall escheat or be forfeited by reason of the attainder or conviction of a trustee or mortgagee, but shall vest in his heir or personal representative.'

[z] Co. Litt. 7, 8.

[a] *Qui contra formam humani generis converso more procreantur, veluti si mulier monstruosum vel prodigiosum enixa sit, inter liberos non computentur. Partus autem qui membrorum officia ampliavit, ut si sex digitos habeat, vel si quatuor tantum, vel si tantum unum, talis inter liberos connumerabitur* (Bract. l. 1, c. 6, § 7). *Sed non dico partum monstruosum licet natura membra minuerit vel ampliaverit; minuerit, ut in defectu digitorum, vel hujus modi; ampliaverit, ut si plures*

to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions,[b] yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby[c] (as the *jus trium liberorum,* and the like); esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue as shall entitle the husband to be tenant by the curtesy;[d] because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

Bastards.

4. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held to be *nullius filii,* the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur.*[e] Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord.[f] The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance:[g] and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not.[h] But our law, in favour of marriage, is much less indulgent to bastards.

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Bastard eignè and mulier puisnè.

There is, indeed, one instance, in which our law showed them some little regard; and that is usually termed the case of *bastard eignè* and *mulier puisnè.* This happened when a man had a bastard son, and afterwards married the mother,

digitos vel articulos, sicut sex vel plures ubi non debet habere nisi quinque; si inutilla natura reddiderit membra, ut si curvus fuerit, vel gibbosus, vel membra tortuosa haberit. (Ibid. l. v. tr. 5, c. 30, § 10.)

[b] Ff. 1, 5, 14.

[c] Ff. 50, 16, 135; Paul. 4, sent. 9, § 63.

[d] Co. Litt. 29.

[e] Co. Litt. 8.

[f] Finch, Law, 117.

[g] Nov. 89, cc. 8, 12.

[h] Cod. 6, 57, 5.

and by her had a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanvil[i] expresses it in his Latin, *filius mulieratus;* the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eignè;* and the younger son is legitimate, or *mulier puisnè*. If then the father died, and the *bastard eignè* entered upon his land, and enjoyed it to his death, and died seised thereof, whereby the inheritance descended to his issue; in this case the *mulier puisnè* and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever), were totally barred of their right.[j] And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him. 2. Because the law would not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate on the subsequent marriage of his mother; and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shown to no other kind of bastards;[k] for, if the mother was never married to the father, such bastard could have no colourable title at all. 'And it would seem that this privilege of the *bastard eignè* no longer exists, in consequence of stat. 3 & 4 Will. IV. c. 27, having enacted (s. 39) that no descent cast shall defeat any right of entry.'

[249] As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore, if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee.[l]

[i] L. 7, c. 1.
[j] Litt. § 399; Co. Litt. 244.
[k] Litt. § 400; 1 Salk. 120.
[l] Bract. l. 2, c. 7; Co. Litt, 244.

5. Aliens, also, are incapable of taking by descent, or inheriting:[m] for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord. **Aliens.**

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase, they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly held,[n] because they have not in them any inheritable blood.

Denization. If an alien were made a denizen by the king's letters patent, and then purchased lands (which the law allowed such a one to do), his son, born before his denization, could not (by the common law) inherit those lands; but a son born afterwards might, even though his elder brother were living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquired [250] a hereditary quality, which would be transmitted to his subsequent posterity. Yet if he had been naturalized by act of **Naturalization.** parliament, such eldest son might then have inherited; for that cancelled all defects, and was allowed to have a retrospective energy, which simple denization had not.[o] 'Letters of Denization are now rarely if ever obtained, the stat 7 & 8 Vic. c. 66, having provided a simple and inexpensive mode by which aliens may obtain all the privileges of natural-born subjects, except those of sitting in the legislature, or being sworn of the Privy Council.'

Sir Edward Coke[p] also holds, that if an alien comes into England, and there has issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For, the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in

[m] Co. Litt. 8.

[n] Co. Litt. 2; 1 Lev. 59.

[o] Co. Litt. 129.

[p] Ibid. 8.

him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before cited, that *cestuy que doit inheriter al pere, doit inheriter al fits;* but also because we have seen that the only feudal foundation, upon which newly-purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors; but in this case, as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum;* that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion has been since overruled:[q] and it is now held for law, that the sons of an alien born here, may inherit to each other. And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

[251] It is also enacted, by the statute 11 & 12 Will. III. c. 6, that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father, or mother, or other ancestor, by, from, through or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis, the elder brother of John Stiles, be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue, his lands will descend to Oliver the younger brother: now if afterwards Francis has a child born in England, it was feared that, under the statute of king William, this new-born child might defeat the estate of his uncle Oliver. Wherefore, it was provided, by the statute 25 Geo. II. c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless

[q] 1 Ventr. 413; 1 Lev. 59; 1 Sid. 193.

they are in being and capable to take as heirs at the death of the person last seised:—with an exception however to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descents by the common law.

Attainder.

6. By attainder for treason or other felony, the blood of the person attainted 'was formerly held to be' so corrupted, as to be rendered no longer inheritable. 'This doctrine has been much modified.'

It is requisite to distinguish between forfeiture of lands to the crown, and escheat to the lord; which, by reason of their similitude in some circumstances, and because the sovereign is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law,[r] as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seignory or lordship paramount:[s] but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat, therefore, operates in subordination to this more ancient and superior law of forfeiture.

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The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised[t]), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the ancient

[r] LL. Aelfred. c. 4; LL. Canut. c. 54.

[s] 2 Inst. 64; Salk. 85.

[t] 3 Inst. 15: stat. 25 Edw. III. c. 2, § 12.

law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason for ever; in case of other felony, for only a year and a day; after which time it went to the lord in a regular course of escheat,[u] as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason.[v]

[253] As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12, enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates; for it is expressly provided by the statute 5 & 6 Edw. VI. c. 11, that the wife of one attaint of high treason shall not be endowed at all.

Corruption of blood.

Hitherto we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting anything for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life; but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit.[w] In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where

[u] 2 Inst. 36. [v] Somner, 53; Wright, Ten. 118. [w] Co. Litt. 13.

a new felony is created by Act of Parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives.[x]

There was formerly yet a farther consequence of the corruption and extinction of hereditary blood, which was this: that the person attainted was not only incapable himself of [254] inheriting, or transmitting his own property by heirship, but also obstructed the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, was not only exhausted for the present, but totally dammed up and rendered impervious for the future. This was a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony.[y] 'But now by statute 3 & 4 Will. IV. c. 106, s. 10, the attainder of any relation, who dies before the descent takes place, does not prevent any person from inheriting the land, who would otherwise have been capable of inheriting it by tracing his descent through such relation.'

This corruption of blood, so far as it now has any operation, cannot be absolutely removed but by authority of parliament. The sovereign may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the Crown is alone concerned; but he cannot wipe away the corruption of the blood; for therein a third person has an interest, the lord who claims by escheat. Formerly, if a man had a son, and was attainted, and afterwards pardoned by the king; this son could never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, continued so: but if the son had been born after the pardon, he might inherit; because by the pardon the father was made a new

[x] 3 Inst. 47.

[y] Van Leeuwen, in 2 Feud. 31.

man, and might convey new inheritable blood to his after-born children.[z] 'But the descendants of a person attainted may now trace their descent *through* him after his death.'[a]

Herein there is, however, a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we [255] have seen, that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he has an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though, had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he has no corruption of blood.[b] So, formerly, if a man had issue two sons, and the elder in the lifetime of the father had issue, and then was attainted and executed, and afterwards the father died, the lands of the father would not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, impeded the descent to the younger, and the land escheated to the lord.[c] Sir Edward Coke in this case allows,[d] that if the ancestor be attainted, his sons born before the attainder may be heirs to each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father; but he makes a doubt (upon the principles before mentioned, which are now overruled[e]) whether sons, born after the attainder, can inherit to each other, for they had never any inheritable blood in them. 'But the statute 3 & 4 Will. IV. c. 106, s. 9, above mentioned, seems to enable the issue of a son who has been attainted and dies, to inherit immediately from the grandfather, or from one another.'

Upon the whole it appears, that a person attainted is

[z] Co. Litt. 392.
[a] 3 & 4 Will. IV. c, 106, s. 10.
[b] Co. Litt. 8.
[c] Dyer, 48.
[d] Co. Litt. 8.
[e] 1 Hal. P. C. 357.

neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, immediately from himself (though he may mediately through himself from any remoter ancestor); for his inheritable blood, which is necessary either to hold, to take, or to transmit immediately any feudal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

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This corruption of blood, thus arising from feudal principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty (which, however severe, is sufficiently justified upon reasons of public policy), but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore, in most (if not all) of the felonies created by parliament since the reign of Henry the Eighth, it is declared, that they shall not extend to any corruption of blood: and by the statute 7 Ann. c. 21 (the operation of which was postponed by the statute 17 Geo. II. c. 39), it was enacted, that after the death of the late Pretender, and his sons, no attainder for treason should extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself. 'These provisions were repealed by 39 Geo. III. c. 93, and subsequently by statute 54 Geo. III. c. 145, it was enacted that no attainder for felony, except in cases of high treason, petit treason (a species of crime since abolished), or murder, or abetting or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person other than that of the offender during his life.'

Exception to escheat in case of corporation.

Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and has left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the

land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told,[f] tacitly annexes a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant fails. [257] This is, indeed, founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself, till that practice was restrained by the statute of *Quia Emptores*, (18 Edw. I. st. 1,) to which this very singular instance still, in some degree, remains an exception.

There was formerly one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It was enacted by the statute 11 & 12 Will. III. c. 4, that every papist who should not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he had attained the age of eighteen years, should be incapable of inheriting, or taking, by descent, as well as purchase, any real estates whatsoever; and his next of kin being a protestant, should hold them to his own use till such time as he complied with the terms imposed by the Act. This incapacity was merely personal; it affected the party himself only, and did not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery one who had entered into religion and became a monk professed was incapable of inheriting lands, both in our own[g] and the feudal law; *eo quod desiit esse miles seculi qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.*[h] But he was yet accounted only *civiliter mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

' But these disabilities of papists were removed by the statutes 18 Geo. III. c. 60, 31 Geo. III. c. 32, and 43

[f] Co. Litt. 13. [g] Co. Litt. 132. [h] 2 Feud. 21.

Geo. III. c. 80, on condition only of their taking the oath of allegiance and making a declaration of their profession of faith, and now by the Roman Catholic Relief Bill (10 Geo. IV. c. 7, s. 23) it is enacted that no oath shall be required to be taken by Roman Catholic subjects for enabling them to hold or enjoy any real or personal property, other than such as by law may be required to be taken by other subjects.'

CHAPTER XVI.

OF TITLE BY OCCUPANCY.

[258] OCCUPANCY is the taking possession of those things, which before belonged to nobody. This is the true ground and foundation of all property, or of holding those things in severalty, which, by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that everything capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome,[a] *quod nullius est, id ratione naturali occupanti conceditur.*

Occupancy and estate *pur auter vie.*

This right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak,) has been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *pur auter vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden: in this case he, that could first enter on the land, might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy.[b]

[259] This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly[c] was supposed so to do; for he had parted with all his interest, so long as *cestuy que*

[a] Ff. 41, 1, 3.
[b] Co. Litt. 41.
[c] Bract. l. 2, c. 9; l. 4, tr. 3, c. 9, § 4. Flet. l. 3, c. 12, § 6; l. 5, c. 5, § 15.

vie lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *haereditas jacens* of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the Crown had the reversion of the lands; for the reversioner has an equal right with any other man to enter upon the vacant possession, and where the title of the Crown and a subject's concur, that of the Crown shall be always preferred: against the sovereign therefore there could be no prior occupant, because *nullum tempis occurrit regi.*[d] And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant:* as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens*, during the residue of the estate granted; though some have thought him so called with no very great propriety;[e] and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II. c. 3, which enacts (according to the ancient rule of law[f]) that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; the other that of 14 Geo. II. c. 20, which enacts, that the surplus of such estate *pur auter vie* after payment of debts shall go in a course of distribution like a chattel interest.[g]

Special occupancy.

[260]

[d] Co. Litt. 41.

[e] Vaugh. 201.

[f] Bract. ibid.; Flet. ibid.

[g] 'These statutes did not apply to copyholds; a defect which was remedied by the Wills Act, 1 Vic. c. 26, which also provides for what had been thought to be a *casus omissus* in the Act of 29 Car. II., namely, when the executors and administrators were special occupants by express limitation.'

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like [h] (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore, by the death of the grantee *pur auter vie*, a grant of such hereditaments was entirely determined), it was formerly considered that, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes it was contended could not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there was a residue left, the statutes gave it to the executors and administrators, instead of the first occupant; but they would not, it was argued, *create* a residue, on purpose to give it to either. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner of lands which before were nobody's; and thereby to supply this *casus omissus*, and render the disposition of law in all respects entirely uniform; this being the only instance wherein a title to a real estate could ever be acquired by occupancy.

'But this point has been set at rest by the statute 1 Vict. c. 26, s. 6, which enacts that if no disposition by will be made of any estate *pur auter vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur auter vie*, whether freehold or customary freehold, tenant right, customary or copyhold,

[h] Co. Litt. 41; Vaugh. 201.

or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy, or by virtue of the said Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. This enactment, it will be observed, vests in the executor or administrator, not only incorporeal hereditaments, but also copyhold estates, which were not touched by the former Acts.'

'It has been said that the case of an estate *pur autre vie* was the only instance where a title to real property could be acquired by occupancy;' for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the sovereign, or in the subordinate lord of the fee, by escheat.

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Lands newly formed.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us,[i] that if an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.[j] Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it

[i] L. 2, c. 2.

[j] Inst. 2, 1, 22.

usually is whenever a several fishery is claimed,[k] there it seems just (and so is the constant practice), that the eyotts or little islands, arising in any part of the river, shall be the property of him who owned the piscary and the soil. However, in case a new island rise in the *sea*, though the civil law gives it to the first occupant,[l] yet ours gives it to the Crown.[m]

[262] And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining.[n] For *de minimis non curat lex:* and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the Crown; for, as the sovereign is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.[o] So that the quantity of ground gained, and the time during which it is gaining, are what make it either the sovereign's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss.[p] And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law; from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked, that whatever has no other owner is vested by law in the Crown.

[k] Salk. 637.
[l] Inst. 2, 1, 18.
[m] Bract. l. 2, c.2; Callis, of Sewers, 22.
[n] 2 Roll. Abr. 170; Dyer, 326.
[o] Callis, 24, 28.
[p] Callis, 28.

CHAPTER XVII.

OF TITLE BY PRESCRIPTION.

'A THIRD method of acquiring real property by purchase is that by prescription, which meant at common law when a man could show no other title to what he claimed than that he and those under whom he claimed had immemorially used to enjoy it. Now immemorial usage, or usage from time whereof the memory of man runneth not to the contrary, was formerly held to be when such usage had commenced not later than the beginning of the reign of Richard I. But as in most cases it was impossible to bring proof of the existence of any usage at this early date, the courts were wont to presume the fact, upon proof only of its existence for some reasonable time back, as for a period of twenty years or more, unless indeed the person contesting the usage were able to produce proof of its non-existence, at some period subsequent to the beginning of the reign of Richard I., in which case the usage necessarily fell to the ground. The proof even of a shorter continuance than for twenty years was enough to raise the presumption, if other circumstances were brought in corroboration, indicating the existence of an ancient right. But the prescription was defeated by proof that the enjoyment, whether for twenty years or any other period within time of legal memory, took place by virtue of a grant or license from the party interested in opposing it, or that it was without the knowledge of him or his agents during the whole time that it was exercised.[a] To remedy the inconvenience and injustice which sometimes followed from this state of the law, the Prescription Act, 2 & 3 Will. IV. c. 71, was passed, which is intituled "An Act for shortening the time of Prescription in certain cases." Although this act provides for all the most usual cases where property may be claimed by prescription,

[a] *Bright* v. *Walker*, 4 Tyr. 509.

yet as its operation is expressly confined to certain cases only, the old law is not entirely superseded by it, and it will accordingly be most convenient to consider first the nature of title by prescription at common law, and then to state the modifications effected by the statute. In a former part of the work, customs or immemorial usages in general, with the several requisites and rules to be observed in order to prove their existence and validity, have been inquired into at large, and at present our task is to distinguish between *custom* strictly taken and *prescription*, and then to show what sort of things may be prescribed for.'

[263] **Prescription and custom distinguished.** And, first, the distinction between custom and prescription is this: that custom is properly a *local* usage, and not annexed to any *person;* such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius and his ancestors, or those whose estate he has, have used time out of mind to have such an advantage or privilege.[b] As, for example, if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held[c] to be a lawful usage), this is strictly a custom, for it is applied to the *place* in general, [264] and not to any particular *persons:* but if the tenant who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he has in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he has:[d] which last is called prescribing in a *que estate.* And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended[e] for an indefinite series of years. But, by the statute of limitations, 32 Hen. VIII. c. 2, it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession has

[b] Co. Litt. 113.
[c] 1 Lev. 176.
[d] 4 Rep. 32.
[e] Co. Litt. 113.

been within threescore years next before such prescription made.[f]

Secondly, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription: as a right of way, a common, &c.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had.[g] For a man shall not be said to prescribe that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but usage. A prescription must, 'at common law,' always be laid in him that is tenant of the fee; for a tenant for life, for years, at will, or a copyholder, cannot prescribe by reason of the imbecility of their estates.[h] For, as prescription is taken to be usage beyond time of memory, it seems absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe, under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors used to have this right of common, appurtenant to the said manor ('formerly *immemorially*, now *for thirty years*'), and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. This mode of pleading, though usual, is no longer necessary in cases falling within the Prescription Act.'

What may be prescribed for.

[265]

3, A prescription cannot be for a thing which cannot be

[f] This title, of prescription, was well known in the Roman law by the name of *usucapio* (Ff. 41, 3, 3), so called, because a man that gains a title by prescription may be said *usu rem capere*.

[g] Dr. & St. Dial. 1, c. 8; Finch, 132.

[h] 4 Rep. 31, 32.

raised by grant. For the law allows prescription only to supply the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus, the lord of a manor cannot prescribe to raise a tax or a toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription.[i] 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record.[j] 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. [266] For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence or appendage of an estate, with which the thing claimed has no connection; but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross.[k] Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor; but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly, we may observe, that estates gained by prescription are not, of course, descendible to the heirs-general, like other purchased estates, but are an exception to the rule. For, pro-

[i] 1 Vent. 387. [j] Co. Litt. 114. [k] Litt. § 183; Finch, L. 104.

perly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo:* and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory follows the nature of its principal.

Statute 3 & 4 Will. IV. c. 71.

'Having thus stated generally the nature of prescription at common law, we come to the statute 3 & 4 Will. IV. c. 71, of which the first section enacts, that no claim which may be lawfully made at the common law, by custom, prescription, or grant to any *right of common* or *other profit or benefit* to be taken or enjoyed from or upon any land of the sovereign, or parcel of the Duchies of Lancaster and Cornwall, or of any ecclesiastical or lay person (excepting certain matters to be referred to immediately), and except tithes, rents, and services, shall, when such right shall have been enjoyed without interruption for thirty years, be defeated or destroyed by showing only that such right was first enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which it is now liable to be defeated; and when such right shall have been enjoyed for sixty years, it shall be deemed indefeasible, unless it appear that it was enjoyed by some consent or agreement expressly made for the purpose by deed in writing. The matters excepted in the first section are, 1. Claims to any way, or other easement, or to any watercourse, or the use of any water; for which a precisely similar enactment is made, except that, instead of the terms of thirty and sixty years, the shorter terms of twenty and forty years are made sufficient to support such claim. And 2. Claims to the use of light, for which an enjoyment of twenty years constitutes an indefeasible title, unless it appear that the right was enjoyed by agreement expressly made for that purpose by deed in writing. It is also enacted by section 5, that where formerly it would have been necessary in pleading to allege the right to have existed from time immemorial, it shall be sufficient to allege the

Right of Common, &c.

Easements.

Windows.

enjoyment as of right during the periods mentioned in the Act as applicable to the case, and without claiming in the name or right of the owner of the fee, as formerly was and still is usually done.'

Tithes.

'With regard to claims to moduses in lieu of tithes, and prescriptions *de non decimando*, or total exemption from tithes, the statute 2 & 3 Will. IV. c. 100, which has been cited in a previous part of this volume, provides that the proof of the existence of a modus or exemption during a period of thirty years preceding the demand made shall be sufficient to support them, except in some particular cases; and the proof of its existence for sixty years gives an indefeasible title, except it be proved that the modus or exemption originated in some agreement expressly made for the purpose by deed or writing.'

CHAPTER XVIII.

OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, has sustained. [267]

Lands, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to a benefice; when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy. '9. By insolvency.'

Causes of forfeiture.

I. The foundation and justice of forfeitures for *crimes and misdemeanors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding volume; but will be more properly considered, and more at large, in the fourth book of these Commentaries. At present I shall only observe in general, that the offences which induce a forfeiture of lands and tenements to the Crown are principally the following five: 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Praemunire.* 5. Drawing a weapon on a judge, or striking any one in presence of the sovereign's principal courts of justice.[a] But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries. [268]

[a] 'A sixth ground of forfeiture was formerly in force, namely, popish recusancy, or non-observance of certain laws enacted in restraint of papists. But the enactments which created this last forfeiture have been repealed.'

II. Forfeiture by illegal alienation.

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, or alienation to an *alien;* in both which cases the forfeiture arises from the incapacity of the alienee to take.[b]

1. Alienation in mortmain.

I. Alienation in *mortmain, in mortuâ manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this has occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain: in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses: how new remedies were still the parents of new evasions: till the legislature at last, though with difficulty, has obtained a decisive victory.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away.

License in mortmain.

[269]

Yet, in consequence of these it was always and is still necessary, for corporations to have a licence in mortmain from the Crown or Parliament to enable them to purchase lands; for as the sovereign is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest.[c] But, besides his general licence from the sovereign, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the Crown and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land. And if no

[b] An alienation by *particular tenants* formerly involved a forfeiture of the estate, which arose from the incapacity of the alienor to grant. See Bl. Com. vol. ii. p. 268.

[c] Selden, Jan. Angl. 1, 2, § 45.

such licence was obtained, the sovereign or other lord might respectively enter on the land so aliened in mortmain as a forfeiture. The necessity of this licence from the Crown was acknowledged by the Constitutions of Clarendon,[d] in respect of advowsons which the monks always greatly coveted, as being the groundwork of subsequent appropriations. Yet, such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly-acquired seigniory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like; and therefore in order to prevent this, it was ordained by the second of King Henry III.'s great charters,[e] and afterwards by that printed in our common statute-books, that all such attempts should be void, and the land forfeited to the lord of the fee.[f] [270]

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein;

[d] *Ecclesiae de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius.* C. 2, A.D. 1164.

[e] A.D. 1217.

[f] *Non liceat alicui de caetero dare terram suam alicui domui religiosae, ita quod illam resumat tenendam de eâdem domo; nec liceat alicui domui religiosae terram alicujus sic accipere, quod tradat illam ei a quo ipsam recepit tenendam: si quis autem de caetero terram suam domui religiosae sic dederit, ut super hoc convincatur, donum suum penitus cassetur, ut terra illa domino suo illius feodi incurratur.* Mag. Cart. 9 Hen. III. c. 36.

and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes,[g] in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bonâ fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 Edw. I.; which provided that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should, by any art or ingenuity, appropriate to himself any lands or tenements in mortmain: upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and in default of all of them, the king, might enter thereon as a forfeiture.

Statute *de religiosis.*

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which, 'until very recently, remained' the great assurance of the kingdom, under the name of *common recoveries.* But upon this the statute of Westminster the second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter,[h] in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the

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[g] 2 Inst 75.

[h] Cap. 33, repealed 19 & 20 Vict. c. 66.

feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *Quia Emptores*, 18 Edw. I., abolished all sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord,[1] a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was marked out by the statute 27 Edw. I. st. 2, it was farther provided by statute 34 Edw. I. st. 3, that no such licence should be effectual, without the consent of the mesne or intermediate lords.

Uses.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in [272] the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to this *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II. c. 5, enacted, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons, and that, for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided

Stat. 15 Ric. II. c. 5.

[1] 2 Inst. 501.

by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore at the dawn of the Reformation, the statute 23 Hen. VIII. c. 10, declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

Stat. 23 Hen. VIII. c. 10.

Crown granted licences of mortmain.

But, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3, c. 3. But, as doubts were conceived at the time of the Revolution how far such [273] licence was valid,[j] since the king had no power to dispense with the statutes of mortmain by a clause of *non obstante*,[k] which was the usual course, though it seems to have been unnecessary:[l] and as, by the gradual declension of mesne seignories through the long operation of the statute of *Quia Emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 Will. III. c. 37, that the crown for the future at its own discretion may grant licences to alien or take in mortmain, of whomsoever the tenements may be holden.

Stat. 7 & 8 Will. III. c. 37.

After the dissolution of monasteries under Henry VIII. though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. c. 8, and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3, that appropriators

17 Car. II. c. 3. Augmentation of livings.

[j] 2 Hawk. P. C. 391. See Harg. Co. Litt. 99, a. n. (1).

[k] Stat. 1 W. & M. st. 2, c. 2.

[l] Co. Litt. 99.

might annex the great tithes to the vicarages; and that all benefices under 100*l.* *per annum* might be augmented by the purchase of lands without licence of mortmain in either case. 'This statute has since been repealed, but various provisions of a similar kind have been made by subsequent statutes.'[m] The like provision was also made in favour of the governors of Queen Anne's bounty.[n] It has also been held,[o] that the statute 23 Henry VIII. before mentioned did not extend to any thing but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses.[p] But as it was apprehended, from recent experience, that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36, that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations. 'This proviso has been repealed by the 5 Geo. III. c. 101; and other statutes have created similar exceptions in favour of other public institutions, as the British Museum;[q] Greenwich Hospital;[r] and the Foundling Hospital.'[s]

Queen Anne's bounty.

Charitable uses.

9 Geo. II. c. 36.

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2. Secondly, alienation *to an alien* is also a cause of for-

2. Alienation to an alien.

'[m] 29 Car. II. c. 8; 1 & 2 Will. IV. c. 45; 1 & 2 Vict. cc. 106, 107; 3 & 4 Vict. c. 113; 4 & 5 Vict c. 45; 5 & 6 Vict. c. 26.

[n] 2 & 3 Ann. c. 11; 43 Geo. III. c 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20.

[o] 1 Rep. 24.

[p] See 6 & 7 Will. IV. c. 70.

[q] 5 Geo. IV. c. 39.

[r] 10 Geo. IV. c. 25.

[s] 11 Geo. II. c. 29.

feiture to the Crown of the lands so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land, but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume.

3. Tortious alienation formerly a cause of forfeiture.

3. Alienations *by particular tenants*, when they were greater than the law entitled them to make, and divested the remainder or reversion, were formerly forfeitures to him whose right was attacked thereby.[t] If tenant for his own life aliened by feoffment or fine for the life of another, or in tail, or in fee, these being estates, which either must or might have lasted longer than his own, the creating them was not only beyond his power, and inconsistent with the nature of his interest, but was also a forfeiture of his own particular estate to him in remainder or reversion. For which there seem to have been two reasons: First, because such alienation amounted to a renunciation of the feudal connexion and dependence; it implied a refusal to perform the due renders and services to [275] the lord of the fee, of which fealty is constantly one; and it tended in its consequence to defeat and divest the remainder or reversion expectant: as therefore that was put in jeopardy by such act of the particular tenant, it was but just, that, upon discovery, the particular estate should be forfeited and taken from him, who had shown so manifest an inclination to make an improper use of it. The other reason was, because the particular tenant, by granting a larger estate than his own, thus by his own act determined and put an entire end to his own original interest; and on such determination the next taker was entitled to enter regularly, as in his remainder or reversion.[u] 'But the abolition of fines and recoveries, and the recent enactment, 8 & 9 Vic. c. 106, s. 4, that no feoffment shall have a tortious operation (the meaning of which phrase shall be explained afterwards), have, it seems, made this cause of forfeiture impossible.'

[t] Co. Litt. 251.

[u] In case of such forfeitures by particular tenants, all legal estates *before* created by them, as, if tenant for twenty years had granted a lease for fifteen, and all charges by him lawfully made on the lands, were good and available in law. (Co. Litt. 233.) For the law would not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he had granted a good and lawful estate, by his own act, to avoid it, and defeat the interest which he himself has created.

The same law which formerly prevailed with regard to tenants for life, held also with respect to all tenants of the mere freehold or of chattel interests; but 'not with respect to' tenant-in-tail, 'for if he' alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called[v]) of the estate tail, which the issue may afterwards avoid by entering on the land;[w] for he in remainder or reversion has only a very remote and barely possible interest therein, until the issue in tail is extinct.

Disclaimer.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer;* as, where a tenant who holds of any lord neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord,[x] upon reasons most apparently feudal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first, or takes upon himself those rights which belong only to tenants of a superior class; if he affirms the reversion to be in a stranger, by attorning as his tenant, collusive pleading, and the like;[y] such behaviour amounts to a forfeiture of his particular estate. 'Thus if a tenant sets up a title hostile to his landlord, it is a forfeiture of his term; and it is the same if he colludes with another person to do so.[z] So if a tenant for years attorn or pay rent to a stranger, it is a forfeiture;—and no notice to quit by the real landlord is necessary, but he may treat the tenant as a trespasser, and eject him.'[a]

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III. Lapse of ecclesiastical presentation.

III. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the Crown by neglect of the metropolitan. For, it being for the interest of religion, and the good of the public, that the church should be provided with an officiating

[v] See Book III, ch. 10.
[w] Stat. 3 & 4 Will. IV. c. 27, s. 39.
[x] Finch, 270, 271.
[y] Co. Litt. 251, 252.
[z] *Doe* d. *Ellerbrock* v. *Flynn*, 1 Cr. M. & R. 141.
[a] *Doe* d. *Davies* v. *Evans*, 9 M. & W. 48.

minister, the law has, therefore, given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority [b]) of the council of Lateran.[c] which was in the reign of our Henry the Second, when the bishops first began to exercise universally the right of institution to churches. And, therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary,[d] unless it has been augmented by the Queen's bounty.[e] But no right of lapse can accrue, when the original presentation is in the Crown.[f]

The term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months,[g] (following in this case the computation of the church, and not the usual one of the common law), and this [277] exclusive of the day of the avoidance.[h] But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in;[i] for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop does not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk.[j] For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop.[k] For he had no permanent right and interest in the advowson, as the patron has, but

[b] 2 Roll. Abr. 363, pl. 10.
[c] Bracton, l. 4, tr. 2, c. 3.
[d] Cro. Jac. 518.
[e] Stat. 1 Geo. I. st. 2, c. 10.
[f] Stat. 17 Edw. II. c. 8; 2 Inst. 273.
[g] 6 Rep. 62; Registr. 42.
[h] 2 Inst. 361. But see 15 Ves. 255.
[i] Gibs. Cod. 769.
[j] 2 Inst. 273.
[k] 2 Roll. Abr. 368.

merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the Crown, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the Sovereign has satisfied his turn by presentation: for *nullum tempus occurrit regi.*[l] And therefore it may seem as if the church might continue void for ever unless the Sovereign shall be pleased to present, and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands of as it were compelling the Crown to present. For, if during the delay of the Crown, the patron himself presents, and his clerk is instituted, the Sovereign, indeed, by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit:* but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the Crown has lost the right, which was only to the next or first presentation.[m]

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In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron; otherwise he can take no advantage by way of lapse.[n] Neither shall any lapse thereby accrue to the metropolitan or to the Crown; for it is universally true, that neither the archbishop nor the Crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and has exceeded his time: for the first step or beginning fails, *et quod non habet principium, non habet finem.*[o] If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his

Disturbance.

[l] Cro. Car. 355.
[m] 7 Rep. 28; Cro. Eliz. 44.
[n] 2 Inst. 632; 44 Geo. III. c. 43.
[o] Co. Litt. 344, 345.

own wrong.[p] Also, if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided.[q]

IV. Forfeiture by simony.

IV. By *simony*, the right of presentation to a living is forfeited and vested *pro hâc vice* in the Crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes,[r] it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However, it was not an offence punishable in a criminal way at the common law;[s] it being thought sufficient to leave the clerk to ecclesiastical censures. But as [279] these did not affect the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers Acts of Parliament have been made to restrain it by means of civil forfeitures, which the modern prevailing usage with regard to spiritual preferments calls aloud to be put in execution. I shall briefly consider them in this place, because they divest the corrupt patron of the right of presentation, and vest a new right in the Crown.

Stat. 31 Eliz. c. 6.

By the statute 31 Eliz. c. 6, it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the Crown shall present to it for that turn only. But if the presentee dies without being convicted of such simony in his life-time, it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the Crown, or otherwise. Also, by the statute 12 Ann. stat. 2, c. 12, if any person for money or profit shall procure, in his own name

12 Ann. stat. 2, c. 12.

[p] 2 Roll. Abr. 369.
[q] Co. Litt. 344.
[r] 3 Inst. 156.
[s] Moor, 564.

or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the Crown.

Upon these statutes many questions have arisen with regard to what is and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony:[t] this being expressly in the face of the statute. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of Queen Anne:[u] and now, by that statute, to purchase, either in his own name, or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony. [280] 'But a contract for the sale of the next presentation, the incumbent being *in extremis*, by a party who presents a clerk who was not privy to the transaction, has been held good.'[v] 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him.[w] 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the Crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture.[x] 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal,[y] provided the patron or his relations be not benefited thereby;[z] for this is no corrupt consideration moving to the patron. 6. That bonds of resignation in case of non-residence or taking any other living, are not simoniacal;[a] there being no corrupt consideration herein, but such only as is for the good of the public. 'Lastly, general bonds to resign at the

[t] Cro. Eliz. 788; Moor, 914.
[u] Hob. 165.
[v] 3 Bligh, N. S. 123; 2 W. Bl. 1052.
[w] Cro. Eliz. 686; Moor, 916.
[x] 3 Inst. 154; Cro. Jac. 385.
[y] Noy, 142.
[z] Stra. 534.
[a] Cro. Car. 180.

patron's request were formerly held legal, but much doubt and fluctuation of opinion having prevailed upon the subject, the stat. 9 Geo. IV., c. 94, was passed, whereby legality was given to bonds of resignation in favour of a single person specially named or described, or of one or two persons, being either by blood or marriage, an uncle, son, grandson, nephew, or grandnephew of the patron. Bonds, both of special and general resignation, not coming within the protection of this statute, are, it seems, void.'[b]

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V Breach of condition.

V. The next kind of forfeiture are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly, by deed, at its original creation, or impliedly, by law, from a principle of natural reason. Both which we considered at large in a former chapter.

VI. Waste.

VI. I therefore now proceed to another species of forfeiture, viz., by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail.[c]

Voluntary, or permissive.

Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste.[d] Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste.[e] 'Although exceptions to this rule exist in the case of some objects of ornament or use, such as looking-glasses, chimney-pieces, pumps, &c., which may be removed, notwithstanding their being more or less firmly fixed to the walls.'[f] If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the statute 14 Geo. III. c. 78, s. 86, no action will lie against a

[b] *Fletcher* v. *Lord Sondes*, 3 Bing. 501; 1 Bligh, N. S. 144.

[c] Co. Litt. 53.

[d] Hetl. 35.

[e] 4 Rep. 64.

[f] Amos & Ferrard on Fixtures, 79.

tenant for an accident of this kind.[g] Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance.[h] Timber also is part of the inheritance.[i] Such are oak, ash, and elm, in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste.[j] But underwood the tenant may cut down at any seasonable time that he pleases;[k] and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.[l] The conversion of land from one species to another is waste. To convert wood, meadow, or pasture into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste.[m] For, as Sir Edward Coke observes, it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in

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[g] With a proviso, however, that the act shall not defeat any agreement between landlord and tenant. But if a lessee covenants to pay rent, and to repair, with an express exception of casualties by fire, he may be obliged to pay rent during the whole term, though the premises are burnt down by accident, and never rebuilt by the lessor. (1 T. R. 310.) Nor can he be relieved by a court of equity (Anst. 687), 'even if' the landlord 'shall have' received the value of his premises by insuring. (See Amb. 621. overruled, 18 Ves. 115; 1 Sim. 146.) And if he covenants to repair generally, without any express exceptions, and the premises are burnt down, he is bound to rebuild them. (2 Com. 626; 6 T. R. 650.)—[Christian.]

[h] Co. Litt. 53.

[i] 4 Rep. 62; 2 Saund. 47 b. n. f.; Id. 259. If during the estate of a mere tenant for life, timber is severed either by accident or by wrong, it belongs to the first person who has a vested estate of inheritance. But where there are intermediate contingent estates of inheritance, and the timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life has himself such estate and sells timber; in these cases, the Chancellor will order it to be preserved for him who has the first estate of inheritance under the settlement. (3 Cox's P. Wms. 266; 3 Woodd, 400.)—[Christian.]

[j] Moore, 813; Hob. 219; 10 East, 446.

[k] 2 Roll. Abr. 817.

[l] Co. Litt. 41.

[m] Hob. 296.

its value.[n] To open the lands to search for mines of metal, coal, &c., is waste; for that is a detriment to the inheritance:[o] but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use;[p] for it is now become the mere annual profit of the land. These three are the general heads of waste, viz., in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction or depreciating the value of the inheritance, is considered by the law as waste.

Who punishable for waste.

Let us next see, who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit privabitur.*" But, in our ancient common law, the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons; guardian in chivalry, tenant in dower, and tenant by [283] the curtesy;[q] and not in tenant for life or years.[r] And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But in favour of the owners of the inheritance, the statutes of Marlbridge (52 Hen. III. c. 23), and of Gloucester (6 Edw. I. c. 5), provided that the action for waste should not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that held in any manner for life or years. So that, for above five hundred years past, all tenants merely for life or for any less estate have been punishable or liable to be impeached for waste, both voluntary and

[n] 1 Lev. 309.

[o] 5 Rep. 12.

[p] Hob. 295.

[q] It was however doubtful whether waste was punishable at the common law in tenant by the curtesy. (Bro. Abr. tit. *Waste*, 88; 2 Inst. 301.)

[r] 2 Inst. 299.

permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti:* that is, with a provision or protection that no man shall *impetere,* or sue him for waste committed.[s] But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes.[t] Neither does an action of waste lie *for the debtor* against tenant by statute, recognisance, or *elegit,* because against them the debtor may set off the damages in account: but it seems reasonable that it should lie *for the reversioner,* expectant on the determination of the debtor's own estate, or of these estates derived from the debtor.[u]

The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages;[v] except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter; but the statute of Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that has the inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted;" and it has been determined that under these words the *place* is also included.[w] And if waste be done [284] *sparsim,* or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited; because it is impracticable for

[s] A tenant for life without impeachment of waste has as full power of cutting down timber, and of opening new mines for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others. (1 T. R. 56; 5 Ves. 425; 2 Swanst. 149, n.; Harg. Co. Litt. 220.) But although such a tenant for life may commit waste for his own benefit, yet he may be restrained by an injunction out of the Court of Chancery from making *spoil and destruction* upon the estate. This distinction was first introduced in the case of Lord Barnard, who was tenant for life without impeachment of waste, with remainder to his eldest son in tail; and having conceived a displeasure against his son, from motives of spleen, began to pull down the family mansion, Raby Castle; but he was restrained by the Chancellor, and ordered to repair it. (2 Vern. 738.) Since that case, such a tenant has been restrained from cutting down avenues and ornamental timber in pleasure grounds, and also young trees not fit for timber; and also trees upon a common two miles distant from the mansion-house, which had been planted as an ornament to the estate. (1 Bro. 166; 3 Bro. 549; 6 Ves. 107; 16 Ves. 185; Jac. 71; 6 Sim. 497. See also 3 Woodd, 399 et seq., where this subject is fully and learnedly treated.)—[CHRISTIAN.]

[t] Co. Litt. 27; 2 Roll. Abr. 826, 828.

[u] Co. Litt. 54; F. N. B. 58.

[v] 2 Inst. 146.

[w] 2 Inst. 303; Co. Litt. 54.

the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood (or perhaps in one room of a house, if that can be conveniently separated from the rest), that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner.

VII. Forfeiture of copyholds.

VII. A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, and waste: whereupon the lord may seize them without any presentment by the homage;[x] but also to peculiar forfeitures annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe that, as these tenements were originally holden by the lowest and most abject vassals, the marks of feudal dominion continue much the strongest upon this kind of property. Most of the offences which occasioned a resumption of the fief by the feudal law, and were denominated *feloniae, per quas vasallus amitteret feudum,* still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service; *si dominum deservire noluerit;* by disclaiming to hold of the lord, or swearing himself not his copyholder; *si dominum ejuravit,* i. e., *negavit se a domino feudum habere:* by neglect to be admitted tenant within a year and a day; *si per annum et diem cessaverit in petendâ investiturâ:* by contumacy in not appearing in court after three proclamations; *si a domino ter citatus non comparuerit:* or by refusing, when sworn of the homage, to present the truth according to [285] his oath; *si pares veritatem noverint, et dicant se nescire, cum sciant.* 'It has been a point of dispute, whether in' these and a variety of other cases, which it is impossible here to enumerate, the forfeiture accrues to the lord before the offences are presented by the homage, or jury of the lord's court baron; *per laudamentum parium suorum:* or as it is more fully expressed in another place, *nemo miles adimatur de possessione sui beneficii, nisi convictâ culpâ, quae sit laudanda*

x 2 Ventr. 38; Cro. Eliz. 499.

per judicium parium suorum. 'The better opinion seems to be that no such presentment is necessary.[y] And it may be added here that the enfranchisement of copyholds, which is now compulsory alike on lord and tenant,[z] if either party desire it, will in the course of time do away altogether with this species of forfeiture.'

VIII. Forfeiture by bankruptcy.

VIII. The eighth method whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined: a trader, who secretes himself, or does certain other acts, 'with intent to defeat or delay' his creditors.

Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavour more fully to explain its nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements are transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt.

'By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, when any person has been adjudged a bankrupt, all lands, tenements, and hereditaments (except copy or customary hold) in any of Her Majesty's dominions to which he is entitled, and any disposable interest he may have in any such property, and any hereditaments which he may either purchase or which may descend or come to him before he obtains his certificate of discharge, becomes vested in the assignees appointed on behalf of the creditors in the manner directed by law, by virtue of such appointment alone, and without any deed or conveyance. As for his copy or customary hold lands, power is given to the commissioners in bankruptcy to sell them, and the commissioner is enabled by the Fines and Recoveries Act to bar any estate tail which the bankrupt may have in any lands, as far as the bankrupt himself might have done the same.'

By this Act, all fraudulent conveyances to defeat the intent [286]

[y] 1 Scriv. Cop. 451.

[z] 16 & 17 Vic. c. 51.

of the statute are declared void; 'but *bonâ fide* purchasers are protected, as shall be pointed out hereafter.'

By virtue of this statute, a bankrupt may lose all his real estates; which may at once be transferred to the assignees in bankruptcy, without his participation or consent.

IX. Forfeiture by insolvency.

IX. 'The ninth method of forfeiture—that by insolvency—is of the same nature as that by bankruptcy. By insolvency is here meant, generally, the inability of a person to satisfy the demands of his creditors. Such persons are dealt with under a different set of statutes from those which apply to bankrupts, the provisions of which will be noticed somewhat more at large in a subsequent part of this volume. It is sufficient to state here that assignees are appointed either by the Court for the Relief of Insolvent Debtors in London or by a judge of the County Court, to be the depositories of the estate and effects of the insolvent, and that his whole real estate, immediately on such appointment, becomes vested in them, without any conveyance, in trust for the benefit of the creditors.'

CHAPTER XIX.

OF TITLE BY ALIENATION.

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THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another: whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

History of the laws of alienation.

This means of taking estates by alienation is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feudal restraint of alienation would have been easily frustrated and evaded.[a] And, as he could not alien it in his life-time, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he alien the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir.[b] And therefore it was very usual in ancient feoffments to express that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant.[c] And, on the other hand, as the feudal obligation was

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[a] Feud. l. 1, t. 27.

[b] Co. Litt. 94; Wright, 168.

[c] Madox, Formul. Angl. No. 316, 319, 427.

looked upon to be reciprocal, the lord could not alien or transfer his seigniory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle, by the lord of a neighbouring clan.[d] This consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases void, or at least incomplete:[e] which was also an additional clog upon alienations.

But by degrees this feudal severity wore off; and experience has shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of King Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been trans- [289] mitted to him in a course of descent from his ancestors:[f] a doctrine which is countenanced by the feudal constitutions themselves:[g] but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to alien his paternal estate.[h] Afterwards, a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to alien:[i] and

[d] Gilb. Ten. 75.

[e] Litt. § 551.

[f] LL. Hen. I. c. 70.

[g] Feud. l. 2, t. 39.

[h] *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum haeredem exhaeredare.* Glanvil, l. 7, c. 1.

[i] Mirr. c. 1, § 3. This is also borrowed from the feudal law. Feud. l. 2, t. 48.

also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir.[j] By the great charter of Henry III., subinfeudation was prohibited of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land. But these restrictions were in general removed by the statute of *Quia Emptores* (18 Edw. I. c. 1), whereby all persons, except the king's tenants *in capite*, were left at liberty to alien all or any part of their lands at their own discretion. And even these tenants *in capite* were, by the statute 1 Edw. III. c. 12, permitted to alien, on paying a fine to the king.[k] By the temporary statutes 7 Hen. VII. c. 3, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to alien their lands without licence, and were relieved from other feudal burdens. And lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as statute Westm. 2 (13 Edw. I. c. 18), which subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognizances by statute 23 Hen. VIII. c. 6. And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold*, 'either for the payment of debts, or for division among creditors under the statutes of bankruptcy or insolvency.' The restraint of *devising* lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last, they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16, nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a

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j Mirr. ibid.

k 2 Inst. 67.

mortgagee after the mortgage is forfeited, or by direction of a court of justice.

In examining the nature of alienation, let us first inquire briefly, *who* may alien, and to *whom;* and then, more largely, *how* a man may alien, or the several modes of conveyance.

I. Who may alien, and to whom.

I. Who may alien, and to whom: or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties; for all persons in *possession* are *primâ facie* capable both of conveying, and purchasing, unless the law has laid them under any particular disabilities. But 'formerly,' if a man had only in him the *right* of either possession or property, he could not convey it to any other, 'on the ground that thus' pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed.[l] Yet reversions and vested remainders might be granted; because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies*, and mere *possibilities*, though they might be released or, in some cases, devised by will, or might pass to the heir or executor, yet could not (it was said) be assigned to a stranger, unless coupled with some present interest.[m] 'But now by statute 8 & 9 Vict. c. 106, contingent, executory and future interests, and possibilities coupled with an interest in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, and rights of entry, whether vested or contingent, may be disposed of by deed; and by statute 1 Vict. c. 26, estates contingent as to the person, and rights of action and entry, which before were not devisable, may now pass by will.'

Attainted persons, &c.

Persons attainted of treason and murder, are incapable of conveying, from the time of the offence committed, provided attainder follows:[n] for such conveyance by them may tend to defeat the Crown of the forfeiture, or the lord of his escheat. But [291] they may *purchase* for the benefit of the Crown, or the lord of the fee, though they are disabled to *hold:* the lands so pur-

[l] Co. Litt. 214.
[m] Sheppard's Touchstone, 238, 239, 322; 11 Mod. 152; 1 P. Wms. 574.
[n] Co. Litt. 42.

chased, if after attainder, being subject to immediate forfeiture; if before, to escheat, as well as forfeiture, according to the nature of the crime.[o] 'With regard to other felonies than those above-mentioned, the statute 54 Geo. III. c. 145, enacts that no attainder for any such felonies shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any other person or persons than the offender during his natural life.' So also, corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.[p] 'Lay corporations, other than municipal, have, in general, power to alien their lands as freely as private owners; but municipal corporations are, by the statute 5 & 6 Will. IV. c. 76, sec. 94, restrained from alienation for any term exceeding thirty-one years. But if absolute alienation, or a lease for a longer period than thirty-one years be desirable, the town council may, after certain public notices, represent the circumstances of the case to the lords of the treasury, and with their approbation may sell absolutely, or demise for such term as may be deemed expedient. Ecclesiastical and eleemosynary corporations, both sole and aggregate, were, by the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10, restrained from alienation beyond the life of the person constituting the corporation sole, or of him who is the head of the corporation aggregate, except by way of lease for a term not exceeding twenty-one years, or three lives. But by various modern statutes, beneficed clergymen are enabled, with the consent, in certain cases, of the patron and ordinary, to mortgage their benefices to raise money for building and repairs;[q] and, in certain cases also to sell their residences, and also to exchange their parsonages and glebes for others.'[r]

Corporations.

Idiots and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are in general voidable, but not actually void. 'And it seems to be now law that any conveyance, except a

Idiots, &c.

[o] Co. Litt. 2.

[p] Co. Litt. 2.

[q] 17 Geo. III. c. 53; 21 Geo. III. c. 66; 5 Geo. IV. c. 89; 1 & 2 Vict. c. 23; and 3 & 4 Vict. c. 113.

[r] 55 Geo. III. c. 147; 1 Geo. IV. c. 6; 6 Geo. IV. c. 8; 7 Geo. IV. c. 66; 1 & 2 Vict. c. 23, 29, 106, &c.

feoffment made by an idiot or lunatic, (except in a lucid interval,) is actually void.'[s] The crown, on behalf of an idiot, may avoid his grants or other acts.[t] But it has been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edw. I., *non compos* was a sufficient plea to avoid a man's own bond:[u] and there is a writ in the register[v] for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity:[w] and, afterwards, a defendant in assize having pleaded a release by the plaintiff, since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assize; doubting whether, as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his [292] senses when he gave it.[x] Under Henry VI. this way of reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument;[y] upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason,[z] the maxim that a man shall not stultify himself has been handed down as settled law:[a] though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it.[b] 'And it has been held by a judge in an ecclesiastical court, to be clear law that a party may come forward

[s] 2 Sugd. Powers, 195, 6th ed.; *Yates* v. *Boen*, 2 Str. 1104.

[t] Co. Litt. 247.

[u] Britton, c. 28, fol. 66.

[v] Fol. 228. See also Memorand. Scacch. 22 Edw. I. (prefixed to Maynard's Year-book, Edw. II), fol. 23.

[w] 5 Edw. III. 70.

[x] 35 Assis. pl. 10.

[y] 39 Hen. VI. 42.

[z] F. N. B. 202.

[a] Litt. § 405; Cro. Eliz. 398; 4 Rep. 123; Jenk. 40

[b] Com. 469; 3 Mod. 310, 311; 1 Equ. Cas. Abr. 279.

to maintain his own past incapacity.'[c] And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant.[d] And so too, if he purchases under this disability, and does not afterwards, upon recovering his senses, agree to the purchase, his heir may either waive or accept the estate at his option.[e] In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him.[f] Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress has ceased.[g] For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases.

Infants.

Duress.

'To remedy the inconveniences arising from the inability of lunatics and infants to deal with estates vested in them as mortgagees and trustees, various acts have been passed in modern times, which are now consolidated in the Trustee Acts, 1850 and 1852. The Court of Chancery is, by these statutes, enabled upon the petition of parties interested, to appoint new trustees in the place of the parties under disability, and to vest the estate in the new trustees by a simple order, and without the necessity of any conveyance. Formerly it was usual for the court to appoint some person to execute a conveyance in the place of the person labouring under disability, but the present simple mode of vesting by an order alone, is an obvious improvement upon the former mode of proceeding. The powers given to the Court of Chancery are very extensive, the statutes being applicable to many other cases than those merely of trustees labouring under disabilities; but it is in such cases that their beneficial operation is most felt. Lunatics, and the estates vested in them, are dealt with under these acts by the Lord Chancellor himself, or the lords justices of the Court of Appeal and Chancery, each being intrusted by the queen's sign manual with the care of the persons and estates of lunatics. It may be added here, that by the statute

Trustee Acts.

[c] 1 Hagg. 414.
[d] Perkins, § 21.
[e] Co. Litt. 2.
[f] Co. Litt. 2; *Dublin and Wicklow Railway Company* v. *Black*, 8 Ex. 181.
[g] 2 Inst. 483; 5 Rep. 119.

1 Will. IV. c. 65, powers of leasing and of taking fines vested in any lunatic may be exercised by the committee of the lunatic under the direction of the Lord Chancellor.'

Feme-covert.

The case of a feme-covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by [293] some act declaring his dissent. And, though he does nothing to avoid it, or even if he actually consents, the feme covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.[h] But the *conveyance* or other contract of a feme-covert (except 'a conveyance made under the provisions of the statute 3 & 4 Will. IV. c. 75') is absolutely void, and not merely voidable;[i] and therefore cannot be affirmed or made good by any subsequent agreement. 'The statute referred to is that by which fines and recoveries were abolished, and simpler modes of assurance substituted. A married woman might formerly have conveyed an interest in lands by fine or recovery. Under the statute in question, she is enabled to dispose of lands by deed, and to release or extinguish any interest therein, as effectually as if she were a feme-sole. But no such disposition can be made without the concurrence of her husband; and the deed, when made, must be acknowledged by her before a judge of the superior or county courts, or before a commissioner appointed for the purpose of taking such acknowledgments, by whom she is examined apart from her husband as to her voluntary consent to the deed. The Court of Chancery has also long recognised the power of a feme-covert to deal at her own pleasure with property vested in trustees for her separate use, provided the settlement itself does not restrain her from alienation; and equity also recognises her contracts relating to such property.'[j]

Aliens.

The case of an alien born is also peculiar. For he may purchase anything; but after purchase he could 'formerly' *hold* nothing except a lease for years of a house for convenience of *merchandise*, in case he were an alien friend: all other purchases (when found by an inquest of office) being immediately

[h] Co. Litt. 3. [i] Perkins, § 154; 1 Sid. 120. [j] 4 Beav. 319.

forfeited to the Crown. 'But alien friends are now, by stat. 7 & 8 Vic. c. 66, enabled to take and hold lands for *residence* or *business* for twenty-one years; and a person born out of the kingdom whose mother is a natural-born subject, is enabled to take any estate by devise, purchase, inheritance, or succession.'[k]

II. Modes of alienation.

II. We are next, but principally, to inquire, *how* a man may alien or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, [294] and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the municipal law has established *descents* and *alienations:* the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own *voluntary* act, shall choose to relinquish it in his life-time. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced; in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons by whom and to whom it was transferred; or, with regard to the subject matter, as what the thing transferred consisted of; or lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The

k 'Papists, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60, within the time limited for that purpose, were formerly, by statute 11 & 12 Will. III. c. 4, disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, were void. But these disabilities have now been entirely swept away.' (10 Geo. IV. c. 7; 2 & 3 Will. IV. c. 115.)

Common assurances.

legal evidences of this translation of property are called the *common assurances* of the kingdom, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

These common assurances are of four kinds:—1. By matter *in pais*, or deed, which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the sovereign's public courts of record, 'or under the authority of a public board or commission empowered by Act of Parliament to record its proceedings.' 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by *devise*, contained in his last will and testament. We shall treat of each in its order.

CHAPTER XX.

OF ALIENATION BY DEED.

IN treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And, in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and thirdly, how it may be avoided. [295]

I. Nature of a deed.

I. First, then, a deed is a writing sealed and delivered by the parties.[a] It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' εξοχην, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed.[b] If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each 'was formerly' cut or indented ('either' in acute angles *instar dentium*, like the teeth of a saw, 'or more usually' in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, was called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists;[c] and with us *chirographa*, or hand-writings;[d] the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom was preserved in making out the indentures of a fine, 'as long as that [296]

[a] Co. Litt. 171.
[b] Plowd. 434.
[c] Lyndew. l. 1, t. 10, c. 1.
[d] Mirror, c. 2, § 27.

mode of assurance was in use.' For other deeds indenting only was employed, without cutting through any letters at all; and 'the practice (already partially obsolete) has, since 1st January 1845, become perfectly useless.[e] When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts:* though it is not unusual for all the parties to execute every part; which renders them all originals. A deed made by one party only, not being indented, but *polled* or shaved quite even, is therefore called a *deed-poll*, or a single deed.[f]

II. Requisites of a deed.
1. Proper parties.

II. We are in the next place to consider the *requisites* of a deed. The *first* of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed: and also a thing or subject-matter to be contracted for; all which must be expressed by sufficient names.[g] So, as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised. 'And as a general rule, no person can take an immediate estate or benefit under an indenture unless he be named a party to it, but any person may take an immediate estate or benefit under a deed-poll, inasmuch as it is addressed to all the world.[h] Generally, also, a covenant entered into by a deed-poll with any covenantor named in the deed, is valid; but a covenant in an indenture entered into with a person not a party, cannot be sued on by that person.[i] But now with regard to *tenements* or *hereditaments*, an immediate estate or interest therein, and the benefit of a condition or covenant respecting them may be taken, although the taker thereof be not named a party to the indenture.'[j]

2. Sufficient consideration.

Secondly, the deed must be founded upon good and sufficient *consideration*. Not upon an illegal contract, nor upon fraud or collusion, either to deceive purchasers *bonâ fide*,[k] or just and lawful creditors;[l] any of which bad considerations will vacate the deed, and subject such persons as put the same in use, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is,

[e] 7 & 8 Vic. c. 76; 8 & 9 Vic. c. 106.
[f] Litt. § 371, 372.
[g] Co. Litt. 35.
[h] Co. Litt. 26, a. 231, n.
[i] *Greene* v. *Hoare*, Salk. 197.
[j] 8 & 9 Vic. c. 106, s. 5.
[k] Stat. 27 Eliz. c. 4.
[l] Stat. 13 Eliz. c. 5.

as it were, of no effect: for it is construed to enure, or to be effectual, only to the use of the grantor himself;[m] 'although strictly it is only deeds of bargain and sale and covenants to stand seised to the use of another, which require a consideration in order to render them effectual at law.' The consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty: a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant;[n] and is therefore founded on motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors and *bonâ fide* purchasers. [297]

3. Deeds must be written.

Thirdly, the deed must be *written* or *printed*, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed.[o] Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both these desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly, many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3, enacts, that no lease, estate, or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value), shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorised in writing. 'And now by

[m] Perk. § 533: [n] 3 Rep. 83. [o] Co. Litt. 229; F. N. B. 122.

statute 8 and 9 Vict. c. 106, a feoffment (other than a customary feoffment made by an infant), made since the 1st of October, 1845, requires to be evidenced by deed. And by the same act, partitions and exchanges of land, not being copyhold, and leases of hereditaments required by law to be in writing, and assignments and surrenders of chattel interests in hereditaments not copyhold (except interests which might have been created without writing), if made after the 1st of October 1845, are void unless made by deed.'

4. Arrangement of deed.

Fourthly, the matter written must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must [298] be left to the courts of law to determine.[p] For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual[q] order.

Premises.

1. The *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.[r]

Habendum.

2, 3. Next come the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As, if a grant be "to A. and the heirs of his body," in the premises, *habendum* "to him and his heirs for ever," or *vice versâ;* here A. has an

[p] Co. Litt. 225. [q] Co. Litt. 6. [r] See Appendix, Nos. I. III. VIII.

estate-tail, and a fee-simple expectant thereon.[s] But, had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void;[t] for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it. The *tenendum*, "and to hold" is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden; viz., "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *Quia Emptores* (18 Edw. I.), it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasers to hold, not of the immediate granter, but of the chief lord of the fee, this use of the *tenendum* has been also antiquated; though for a long time after we find it mentioned in ancient charters that the tenements shall be holden *de capitalibus dominis feodi;*[u] but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

Tenendum.

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4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor creates or reserves some new thing to himself out of what he had before granted, as "rendering therefore yearly the sum of ten shillings or a pepper-corn, or two days' ploughing, or the like."[v] Under the pure feudal system, this render, *reditus*, return, or rent, consisted in chivalry principally of military services, in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed.[w] But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.

Reddendum.

5. Another of the terms upon which a grant may be made

Conditions.

[s] Co. Litt. 21; 2 Roll Rep. 19, 23.
[t] 2 Rep. 23; 8 Rep. 56.
[u] Madox, Formul. passim.
[v] Appendix, No. XI. *Lease of a house, &c. reserving rent.*
[w] Plowd. 13; 8 Rep. 71.

is a *condition;* which is a clause of contingency, on the happening of which the estate granted may be defeated; as "provided always," that if the mortgagor shall pay the mortgagee 500*l.* upon such a day, the whole estate granted shall determine;" and the like.[x]

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Warranty.

6. 'In ancient deeds there frequently followed a' clause of *warranty;* whereby the grantor, for himself and his heirs, warranted and secured to the grantee the estate so granted. By the feudal constitution, if the vassal's title to enjoy the feud was disputed, he might vouch, or call the lord or donor, to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense.[y] And so, by our ancient law, if before the statute of *Quia Emptores* a man enfeoffed another in fee, by the feudal verb *dedi,* to hold of himself and his heirs by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered.[z] Or if a man and his ancestors had immemorially held land of another and his ancestors by the service of homage (which was called *homage auncestrel*), this also bound the lord to warranty;[a] the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a 'common law' partition or exchange of lands of inheritance, either party or his heirs were evicted of his share, the other and his heirs were bound to warranty,[b] because they enjoyed the equivalent. And so, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent was payable) were bound to warrant the title.[c] But, in a feoffment in fee, by the verb *dedi,* the feoffor only, since the statute of *Quia Emptores,* has been bound to the implied warranty, and not his heirs;[d] it being a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied;[e]

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[x] Appendix, No. X.
[y] Feud. l. 2, t. 8 & 25.
[z] Co. Litt. 384.
[a] Litt. § 143.
[b] Co. Litt. 174.
[c] Co. Litt. 384.
[d] Co. Litt. 384.
[e] Co. Litt. 102.

they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which was a kind of covenant real, and could only be created by the verb *warrantizo* or *warrant*.[f]

These express warranties were introduced, even prior to the statute of *Quia Emptores*, in order to evade the strictness of the feudal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty had been added to the ancestor's grant, this covenant descending upon the heir, insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood;[g] and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee-simple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as where a father, or an elder son in the life of a father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son. *Collateral* warranty was where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother. But where the very conveyance, to which the warranty was

Lineal warranty

Collateral warranty.

[f] Litt. § 733.

[g] Co. Litt. 373.

annexed, immediately followed a disseisin, or operated itself as such (as, where a father, tenant for years, with remainder to his son in fee, aliened in fee-simple with warranty), this, being in its origin manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseisin;* and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor.[h]

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor.[i] But though, without assets, he was not bound to insure the title of *another*, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself;* for, if he could succeed in such claim, he would then gain assets by descent (if he had them not before), and must fulfil the warranty of his ancestor: and the same rule[j] was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to alien their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the statute of Gloucester, 6 Edw. I. c. 3, declared, that such warranty should be no bar to the son, unless assets descended from the father. It [303] was afterwards attempted in 50 Edw. III., to make the same provision universal, by enacting that no collateral warranty should be a bar, unless where assets descended from the same ancestor;[k] but this was not effected. However, by the statute 11 Hen. VII. c. 20, notwithstanding any alienation with warranty by tenant in dower, the heir of the husband

[h] Litt. § 698, 702.
[i] Co. Litt. 102.
[j] Litt. § 711, 712.
[k] Co. Litt. 373.

is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16, all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail in possession, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *De Donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar:[l] which was therefore formerly mentioned as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They also held, that collateral warranty was not within the statute *De Donis;* as that act was principally intended to prevent the tenant in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon.[m] And so it continued to be, notwithstanding the statute of Queen Anne, if made by tenant in tail in possession 'until the Act which abolished fines and recoveries: and such tenant might' without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, barred his own issue, and without them barred such of his heirs as might be in remainder or reversion.

'But now, by the statute 3 & 4 Will. IV. c. 74, all warranties entered into after the 31st day of December 1833, by a tenant in tail, shall be void against the issue in tail, and remainder-man. By the statute 3 & 4 Will. IV. c. 27, s. 39, the effect of warranty in tolling a right of entry was taken away, and by the same statute the writ of *warrantia chartæ* and the *writ of voucher*, by the help of which the party wishing

[l] Litt. § 712; 2 Inst. 293. [m] Co. Litt. 374; 2 Inst. 335.

to obtain the protection of warranty, might have defended himself, were also abolished. So that warranties of real estate, which have indeed been long disused, cannot now have any practical operation.'[n]

Covenants.

7. Next follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus, the grantor may covenant that he has a right to convey, or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c. If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than the warranty formerly was. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extended to all mankind. For which reasons amongst others the covenant has in modern practice totally superseded the other.

The conclusion.

8. Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly or by reference to some day and year before mentioned. Not but a deed is good, although it mention no date: or has a false date; or even if it has an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is delivered, can be proved.[o] 'For the date which a deed bears is merely *primâ facie* evidence of the date, the true date being the day on which the deed was delivered by the grantor.'[p]

[n] *Doe* d. *Thomas* v *Jones*, 1 Cr. & J. 538.

[o] Co. Litt. 46; Dyer, 28. The date of a deed is not essential (Com. Dig. *Fait*, B. 3). In ancient times the date of the deed was generally omitted, and the reason was this, viz., that the time of prescription frequently changed, and a deed dated before the time of prescription was not pleadable, but a deed without date might be alleged to be made within the time of prescription. Dates began to be added in the reigns of Edw. II. and Edw. III.—[CHRISTIAN.]

[p] *Styles* v. *Wardle*, 4 B. & C. 908.

I proceed now to the *fifth* requisite for making a good deed, the *reading* of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.[q]

5. Deed must be read.

Sixthly, it is requisite that the party, whose deed it is, should *seal*, and now in most cases, I apprehend should *sign* it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history.[r] And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase.[s] In the civil law also,[t] seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in England. For though Sir Edward Coke[u] relies on an instance of king Edwin's making use of a seal about an hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed, this inability to write, and therefore making a

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6. Signing and sealing.

q 2 Rep. 3, 9; 11 Rep. 27.

r 1 Kings, c. 21; Dan. c. 6; Esth. c. 8.

s "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." (c. 32.)

t Inst. 2, 10, 2 & 3.

u 1 Inst. 7.

cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters.[v] In like manner, and for the same unsurmountable reason, the Normans, a brave [306] but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England.[w] At the Conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross.[x] And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals.[y] The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books, that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds,—"*sealed* and delivered," continues to this day; notwithstanding the statute 29 Car. II. c. 3, before mentioned, revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which

[v] "*Propriâ manu pro ignorantiâ literarum signum sanctæ crucis expressi et subscripsi*" (Seld. Jan. Angl. l. 1, s. 42). And this (according to Procopius), the emperor Justin in the east, and Theodoric king of the Goths in Italy, had before authorised by their example.

[w] Lamb, Archeion. 51.

[x] "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Angliâ firmari solitam, in ceram impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

[y] Stat. Exon. 14 Edw. I.

therefore signing seems to be now as necessary as sealing, though it has been sometimes held that the one includes the other.[z]

A *seventh* requisite to a good deed is that it be *delivered*, by the party himself or his certain attorney: which therefore is also expressed in the attestation, "sealed and *delivered*." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it; 'the day of the delivery by the grantor being, as we have seen, the true date of the deed.' And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing,[a] and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a *deed*, but as an *escrow;* that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.[b]

7. Delivery.

Escrow.

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses:* though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers;[c] which were written memoranda, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum, thus: "*hijs testibus Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis.*"[d] This, like all other solemn transactions, was originally done only *coram paribus*,[e] and frequently when

8. Attestation.

[z] 3 Lev. 1. Stra. 764. '*Cherry* v. *Heming*, 4 Ex. 631, supports the view that signing is not indispensable.'

[a] 1 Perk. § 130.

[b] Co. Litt. 36.

[c] Feud. l. 1, t. 4.

[d] Co. Litt. 6.

[e] Feud. l. 2, t. 32.

assembled in the court baron, hundred, or county court; which was then expressed in the attestation, *teste comitatu, hundredo*, &c.[f] Afterwards the attestation of other witnesses [308] was allowed, the trial in case of a dispute being still reserved to the *pares;* with whom the witnesses (if more than one) were associated and joined in the verdict:[g] till that also was abrogated by the statute of York, 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hijs testibus*, are all old deeds and charters, particularly *Magna Charta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner.[h] But in the common charters, writs, or letters patent of the Crown, the style is now altered: for at present the sovereign is his own witness, and attests his letters patent thus: "*Teste meipso*, witness ourself at Westminster, &c.," a form which was introduced by Richard the First,[i] but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the Eighth;[j] which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed.[k]

III. Deeds, how avoided.

III. We are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing 'or printing' on paper or parchment: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto:* as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation.[l] 2. By breaking off, or defac-

[f] Spelm. Gloss. 228; Madox, Formul. No. 221, 322, 660.
[g] Co. Litt. 6.
[h] 2 Inst. 77.
[i] Madox, Formul. No. 515.
[j] Madox, Dissert. fol. 32.
[k] 2 Inst. 78.
[l] 11 Rep. 27.

ing the seal, 'with the intention of avoiding the deed, and that by the party to whom the other is bound, for mere accidental defacement is of no effect.'[m] 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice-work or *cancelli;* though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as, the husband, where a feme-covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was anciently the province of the court of Star Chamber. 'It is now the province of the courts both of law and equity,' when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery.[n] In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estates: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former being principally such as serve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances:* which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses.*

I. Conveyance at Common Law

I. Of conveyances by the common law, some may be called *original*, or *primary* conveyances; which are those by means

[m] 5 Rep. 23; Touchstone, c. 4, s 6, 2.

[n] Toth. *numo.* 24; 1 Vern. 348. 'In the Courts of Law, when a deed is relied on either in pleading or in evidence, the fraud or force by which it was obtained may be set up in the former case by way of answer, in the latter by way of counter-evidence, in order to avoid the instrument. So long, then, as proof can be given of the fraud or force used in obtaining the deed, there is no necessity for resorting to a Court of Equity for relief. But as a Court of Equity will direct a deed that is void for any reason, not apparent on the face of it, to be delivered up to be cancelled, there is often great advantage in resorting at once to the Court of Chancery, and this course ought to be adopted where there is any danger of the loss of the evidence of the fraud or force.' (Story's Eq. Juris. ch. 17.)

whereof the benefit or estate is created or first arises: others are *derivative*, or *secondary;* whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

[310] *Original* conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: *Derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance.

1. Feoffment.

1. A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi.* It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor;* and the person enfeoffed is denominated the *feoffee.*

This is plainly derived from, or is indeed itself the very mode of the ancient feudal donation; for though it may be performed by the word, "enfeoff" or "grant," yet the aptest word of feoffment is, "*do* or *dedi.*" And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo,*" is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi.*"[o] And therefore as in pure feudal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse praesumatur, quam in donatione expresserit;*" so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) has barely an estate for life.[p] For, as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person and subsist only for his life; unless the feoffor, by express provision in [311] the creation and constitution of the estate, has given it a longer continuance. These express provisions are indeed

[o] Wright, 21. [p] Co. Litt. 42.

generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple,[q] by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate of freehold.[r]

Livery of seisin.

But by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called *livery of seisin;* without which the feoffee has but a mere estate at will.[s] This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investiturâ nullo modo constitui potuit:*"[t] and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinae conjunctio.*"[u].

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord;* and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And, at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession;* which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them, in the name of the whole.[v] And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property

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[q] See Appendix I.
[r] Co. Litt. 9.
[s] Litt. § 70.
[t] Wright, 37.
[u] L. 3 c. 15, § 5.
[v] Ff. 41, 2, 3; Cod. 2, 3, 20.

completely in the new proprietor; who, according to the distinction of the canonists,[w] acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also, 'by the ancient law of inheritance,' even in descents of lands which were cast on the heir by the act of the law itself, the heir had not *plenum dominium*, or full and complete ownership, till he had made an actual corporal entry into the lands: for if he died before *entry* made, *his* heir was not entitled to take the possession, but the heir of the person who was last actually seised. It was not therefore only a mere right to enter, but the actual entry that made a man complete owner; so as to transmit the inheritance to his own heirs: 'the old doctrine being,' *non jus, sed seisina, facit stipitem.*[x]

Yet, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. [313] Among the Jews we find the evidence of a purchase thus defined in the book of Ruth: "Now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel." Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses.[y] With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands.[z] And, to this day, the conveyance of

[w] Decretal, l. 3, t. 4, c. 40.
[x] Flet. l. 6, c. 2, § 2.
[y] Stiernhook, de Jure Sueon. l. 2, c. 4.
[z] Hickes, Dissert. Epistolar. 85.

our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of tenants.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify [314] and perpetuate the peculiar purposes of the party who conveyed: yet still, for a long series of years, they were never made use of, but in company with the ancient and notorious method of transfer, by delivery of corporal possession.

Livery of seisin, by the common law, was necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses: and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual *entry* is necessary to vest the estate in the lessee; for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini:* and, when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years.[a] This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have

[a] Co. Litt. 46.

given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they could not (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in praesenti*, or not at all.

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen that at the common law livery must have been made to the particular tenant. But if such a remainder were created afterwards, expectant on a lease for years now in being, the livery must not have been made to the lessee for years, for then it operated nothing; "*nam quod semel meum est, amplius meum esse non potest;*" but it must have been made to the re- [315] mainder-man himself, by consent of the lessee for years: for without his consent no livery of the possession could be given;[b] partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given for introducing the doctrine of attornments.

Livery in deed.

Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, delivers to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, the house being empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut-to the door, and then open it, and let in the others.[c] If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all;[d] but, if they be in several counties, there must be as

[b] Co. Litt. 48, 49. [c] Co. Litt. 48; West, Symb. 251. [d] Litt. § 61, 414, 418.

many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto,* before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law, *pares debent interesse investiturae feudi, et non alii:* for which this reason is expressly given; because the peers or vassals of the lord, being bound [316] by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed (like that of all other attestations), was still reserved to the *pares* or jury of the county.[e] Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest.[f] And thus much for livery in deed.[g]

Livery in law.

Livery in *law* was where the same was not made *on* the land, but *in sight of it* only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee entered during the life of the feoffor, it was a good livery, but not otherwise; unless he dared not enter, through fear of his life or bodily harm: and then his *continual claim,* made yearly, in due form of law, as near as possible to the lands,[h] sufficed without an entry; 'or rather had the same effect with, and in all respects amounted to, a legal entry. Such an entry gave the feoffee seisin, and thereby made him complete owner, and capable of conveying the lands from himself by either descent or purchase.[i] Now, however, by the statute 3 & 4 Will. IV. c. 27, no continual claim can preserve any right of entry, and no right can now be kept alive, as it was formerly, by continual claim.'

'Feoffments of late have been little used. This kind of con-

[e] Gilb. 10, 35.
[f] Dyer, 18.
[g] See Appendix I.
[h] Litt. § 421, &c.
[i] Co. Litt. 15, 48, 254.

veyance formerly had the effect of passing a fee, if purporting to do so, even though the feoffor had a less interest or estate in the property. It also destroyed contingent remainders and powers appendant, and might create a forfeiture. Hence it was called a *tortious conveyance*, while other assurances, such as grant, bargain and sale, lease and release, were styled innocent conveyances, and had no operation beyond passing such estate as the party had to convey. The statute 8 & 9 Vict. c. 106, which abolished the tortious operation of feoffments, enacts that corporeal hereditaments, as regards the conveyance of the immediate freehold, shall lie *in grant* as well as *in livery;* and thus removes altogether the grounds upon which feoffments were occasionally resorted to in later times.'

2. Gifts.

2. The conveyance by *gift, donatio,* is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi;*[j] and gifts in tail were equally imperfect without livery of seisin, as feoffments in fee-simple.[k] [317] And this is the only distinction that Littleton seems to take, when he says, "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;" viz. feoffor is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are,

3. Grants.

3. Grants, *concessiones;* the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had.[l] For such reason all corporeal hereditaments, as lands and houses, were said to lie *in livery;* and the others, as advowsons, commons, rents, reversions, &c., to lie *in grant.*[m] And the reason is given by Bracton:[n] "*traditio*, or livery, *nihil aliud est quam rei corporalis de personâ in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quae sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur.*" These, therefore, pass merely by the delivery of the

[j] West, Symbol. 256. [k] Litt. § 59. [l] Co. Litt. 9. [m] Co. Litt. 172. [n] l. 2, c. 18.

deed. And in seigniories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It, therefore, differed but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi*, "have given and granted." 'And now that the immediate freehold, as has been pointed out already, lies *in grant*, and that a feoffment has no tortious operation, there is practically no difference whatever between these two kinds of conveyance.'

4. Leases.

4. A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense), made for life, for years, or at will, but always for a *less* time than the lessor has in the premises: for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, "demise, grant, and to farm let; *dimisi, concessi et ad firmam tradidi.*" *Farm*, or *feorme*, is an old Saxon word signifying provisions:[o] and it came to be used instead of rent or render, because anciently, the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme:* though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments. Livery of seisin was formerly indeed incident and necessary to one species of leases, viz. leases for life of corporeal hereditaments, and to no other; 'but a lease for life may now by statute 8 & 9 Vict. c. 106, be created by *grant*, like any other freehold.'

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Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of

[o] Spelm. Gloss. 229.

any duration; for he has the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary.[p] So also bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, 'or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

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Enabling statute, 32 Hen. VIII. c. 28.

And, first, the *enabling* statute, 32 Hen. VIII. c. 28, empowered three manner of persons to make leases, to endure for three lives or one-and-twenty years; which could not do so before. As, first, tenant in tail might by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joined in such lease, might bind her and her heirs thereby. Lastly, all persons seised of an estate of fee-simple in right of their churches, which extends not to parsons and vicars, were enabled (without the concurrence of any other person) to bind their successors. 'This statute has, however, been repealed by the statute 19 and 20 Vict. c. 120, except as far as concerns leases made by persons seised in right of their churches. Persons entitled to settled estates for life, or other greater estate, whether in their own right or in that of their wives, and tenants by the curtesy or

[p] Co. Litt. 44.

in dower, or those seised in right of their wives of unsettled estates, can now grant valid leases, not exceeding twenty-one years, and to take effect in possession, of any part of their property, except the principal mansion-house and its demesnes. Such leases must be made by deed, and the best rent must be reserved, and no fine be taken. The lease must be made subject to impeachment for waste, and the lease itself contain all usual and proper covenants. These leases are valid against all persons claiming subsequent estates, or in the case of unsettled estates against those claiming through or under the wife or husband (as the case may be) of the party granting the lease. This power it may be added is not given to persons entitled under settlements dated previous to November 1856. —As to persons seised in right of their churches, the old statute of Henry VIII. still remains in operation; and in leases made by them,' there must many requisites be observed, which the statute specifies, otherwise such leases are not binding.[q] 1. The lease must be by indenture; and not by deed-poll or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, *or* three lives; and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term.[r] 6. It must be of lands and tenements most commonly let for twenty years past; so [320] that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 7. The most usual and customary farm or rent, for twenty years past, must be reserved yearly on such lease. 8. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the successor, of the reasonable indulgence here given.

[q] Co. Litt. 44.

[r] The lease must formerly have been 'of corporeal hereditaments, and not of such things as lay merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain (Bl. Com. v. ii. p. 319). But now by the statute 5 Geo. III. c. 17, a lease of incorporeal hereditaments may be granted, and the successor shall be entitled to recover the rent by an action of debt.'

Disabling statute, 1 Eliz. c. 19.

Next follows, in order of time, the *disabling* or *restraining* statute, 1 Eliz. c. 19 (made entirely for the benefit of the successor), which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law) other than for the term of one-and-twenty years, or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the Act.[s] But, by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the Crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which[t] for the future, the statute 1 Jac. I. c. 3, extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

1 Jac. I. c. 3.

13 Eliz. c. 10.

Next comes the statute 13 Eliz. c. 10, explained and enforced by the statutes 14 Eliz. c. 11 & 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, which extend the restrictions, laid by the [321] last-mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical, or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations:—1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon. 3. Houses in corporations, or market towns, may be let for forty years; provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: and they may also be aliened in fee-simple, for lands of equal value in recompense. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made with-

[s] Co. Litt. 45.

[t] 11 Rep. 71.

out impeachment of waste.[u] 6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

Concerning these restrictive statutes there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty-one years, or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent. Secondly, that though leases contrary to these acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the Act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong.[v]

[322] College leases.

There is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6, which directs that one-third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.*, or a quarter of malt for every 5*s.*; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This is said[w] to have been an invention of Lord Treasurer Burleigh, and Sir Thomas Smith, then principal Secretary of State; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies (which effects were likely to increase to a greater degree), devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is, *communibus annis*, almost double to the rents reserved in money.

[u] Co. Litt. 45. [v] Co. Litt. 44, 45. [w] Strype's Annals of Eliz.

'The statute 6 & 7 Will. IV. c. 20 has restrained, in some respects, the renewal of leases by ecclesiastical persons. No new lease of any ecclesiastical property may be granted by way of renewal of a lease granted for two or more lives, until the death of one of the persons for whose life the lease was made, and then only for the lives of the survivors and the individual substituted for the person deceased. No renewal can be made of a lease for forty years until fourteen shall have expired, of a lease for thirty years until ten, nor of a lease for twenty-one years until seven, have expired. Nor can any lease for lives be granted by way of renewal of one for years.'

'The statute 5 Vict. c. 27, however, enables incumbents of benefices, with the consent of the patron and the bishop, and under several restrictions calculated to secure the best yearly rent, to grant farming leases which must not in general exceed fourteen years in duration. In some cases the lease may be for twenty years. The statute 5 & 6 Vict. c. 108 also enables ecclesiastical corporations, both aggregate and sole, under certain restrictions, to grant building leases of their lands for terms not exceeding ninety-nine years, and mining leases for terms not exceeding sixty years.'

'Beneficed clergymen were disabled, by various early statutes, from leasing the profits of their benefices, in case of their non-residence; but licensed pluralists were allowed to demise the living on which they were non-resident to their curates only.[x] But the acts I refer to are now repealed, and the statute 1 & 2 Vict. c. 106, which has put the law as to the non-residence of the clergy on a new footing, enacts that all agreements for letting houses of residence, belonging to any benefice, shall be made in writing, and shall contain a condition for avoiding the same, upon a copy of any order of the bishop (directing a spiritual person to reside on the benefice, or assigning the residence to a curate) being served upon the occupier, or left at the house; otherwise such agreement shall be void. And persons holding possession of any such residence after the day on which such spiritual persons are directed to reside, upon notice to that effect, are to forfeit 40*s*. for every day they so hold over.'

[x] 13 Eliz. c. 20; 14 Eliz. c. 11; 18 Eliz. c. 11; 43 Eliz. c. 9.

And thus much for leases, with their several enlargements and restrictions.

5. Exchange at common law.

5. An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it connot be supplied by any other word or expressed by any circumlocution.[y] The estates exchanged must be equal in quantity;[z] not of *value*, for that is immaterial, but of *interest;* as fee-simple for fee-simple, a lease for years for a lease for years, and the like. And the exchange may be of things that lie either in grant or in livery.[a] But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance;[b] for each party stands in the place of the other, and occupies his right, and each of them has already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety.[c] And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own.[d] For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title, he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.[e]

Exchange by mutual conveyance.

'The inconveniences attending this common law exchange have caused it to be disused; and usually when an exchange is to be made, it is effected by a mutual conveyance of the lands, which does not involve the same consequences as the exchange at common law; for, as we have already seen, there is no implied warranty of title by the grantor, since the statute of *Quia Emptores.* And the recent statute 8 & 9 Vict. c. 100, has farther enacted that no exchange made by deed,

[y] Co. Litt. 50, 51.
[z] Litt. § 64, 65.
[a] Co. Litt. 50.
[b] Litt. § 62.
[c] Co. Litt. 50.
[d] Perk. § 288.
[e] As to warranty at common law, see *ante* page 296.

executed subsequently to October 1st, 1845, shall imply any condition in law.'

'The General Inclosure Act, 8 & 9 Vict. c. 118, contains a provision by which the Inclosure Commissioners are enabled to effect exchanges of lands. On the application in writing of the persons interested in the lands proposed to be exchanged, the Commissioners may direct inquiries whether the proposed exchange would be beneficial to the owners, and if they come to be of that opinion, they may frame an order of exchange with a map or plan of the lands to be both given and taken in exchange; and such order is not to be impeached by reason of any infirmity of estate of the persons on whose application it shall be made. The chief advantages attending this method of exchange is that the land on each side taken in exchange, remains, and enures to the same uses, trusts, intents, and purposes, and is subject to the same charges as the land given in exchange. Thus each owner holds the newly-acquired land upon precisely the same title as he held what he had before, and none of the inconvenient consequences of the old common law title by exchange can arise. Persons having but limited interests in the land, may, by the help of the statute I have mentioned, effect exchanges which may be a great benefit to the estate, and which it would have been impossible for them to bring about in any other way.'

6. Partition. [324]

6. A partition, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law, coparceners, being compellable to make partition, might have made it by parol only; 'tenants in common might have done so likewise, afterwards perfecting the partition by livery of seisin;'[f] but joint-tenants must have done it by deed, 'in which case, as each joint-tenant was already seised of the whole, no livery of seisin was necessary.'[g] But the statute of frauds (29 Car. II. c. 3) abolished this distinction, and 'now,

[f] Co. Litt. 169 a. [g] Litt § 250; Co. Litt. 200 b.

by statute 8 & 9 Vict. c. 106, a deed is in all cases necessary. Partition may be effected in the same way as exchanges under the authority of the Inclosure Commission.'[h]

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. Releases. 7. Releases; which are a discharge or conveyance of a man's right in lands or tenements, to another that has some former estate in the lands.* The words generally used therein are "remised, released, and for ever quit-claimed."[i] And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate:* as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee.[j] But in this case the relessee must have some estate 'vested in interest, though it need not be in possession,' for the release to work upon; for 'at common law,' if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee.[k] 2. By way of *passing an estate*, or *mitter l'estate:* as when one of two coparceners releases all her right to the other, this passes the fee-simple of the whole. And in both these cases there must be a privity of estate between the relessor and the relessee;[l] that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit:* as if a man be disseised, and releases to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.[m] 4. By way of *extinguishment:* as if my tenant for life makes a lease to A. for life remainder to B. and his heirs, and I release to A.;

1. By enlarging an estate.

2. Passing of estate.

[325]

3. Passing a right.

4. Extinguishment.

[h] 8 & 9 Vic. 118.
[i] Litt. § 445.
[j] Litt. § 465.
[k] Litt. § 459.
[l] Co. Litt. 272, 273.
[m] Litt. § 466.

this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate.[n] 5. By way of *entry* and *feoffment:* as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee.[o]

5. By entry and feoffment.

For when a man had in himself the possession of lands, he must at the common law have conveyed the freehold by feoffment and livery; which made a notoriety in the country: but if a man had only a right or a future interest, he might convey that right or interest by a mere release to him that was in possession of the land: for the occupancy of the relessee was a matter of sufficient notoriety already.

8. Confirmation.

8. A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it[p] to be a conveyance of an estate or right *in esse* whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, "have given, granted, ratified, approved, and confirmed."[q] An instance of the first branch of the definition is, if tenant for life leases for forty years, and dies during that term; here the lease for years is voidable by him in reversion; yet, if he has confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure.[r] The latter branch, or that which tends to the increase of a particular estate is the same in all respects, with that species of release, which operates by way of enlargement.

[326]

9. Surrender by deed.

9. A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender

[n] Litt. § 470. Littleton elsewhere (§ 479) defines releases which enure by way of extinguishment against all persons to be, "where he to whom the release is made cannot have that which to him is released; as if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seignory, or all the right which he hath in the land, &c. This release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself."

[o] Co. Litt. 278.

[p] 1 Inst. 295.

[q] Litt. § 515, 531.

[r] Litt. § 516.

is the falling of a less estate into a greater. It is defined,[s] a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "hath surrendered, granted, and yielded up." The surrenderor must 'have a vested estate,'[t] and the surrenderee must have a higher estate, in which the estate surrendered may merge: therefore tenant for life cannot surrender to him in remainder for years.[u] 'But a term of years may be merged in a reversionary term.'[v] In a surrender there was never any occasion for livery of seisin;[w] for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate, and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery was required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes; since the reversion of the relessor, or confirmor, and the particular estate of the relessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory.[x]

Surrender in law

'There may also be an indirect surrender, or surrender in law as it is called, by the acceptance by the tenant of a new estate inconsistent with his prior estate. Thus a new lease made to a person in possession under an old lease, and accepted by him, operates as a surrender in law of the old one, for from such acceptance the law implies his intention to yield up the estate which he had before, though he may not by express words of surrender have declared as much.[y] And where a tenant from year to year underlet the premises to another, and the original landlord with the assent of the original tenant accepted the under lessee as his tenant, a surrender in law was held to have taken place of the first tenant's interest.[z] Surrenders thus implied by the law are not touched by the recent

[s] Co. Litt. 337.

[t] Co. Litt. 338.

[u] Perk. § 589.

[v] *Doe* d. *Rawlings* v. *Walker*, 5 B. & Cr. 123.

[w] Co. Litt. 50.

[x] Litt. § 460.

[y] Shep. Touchst. 300; *Ive's* case, 5 Rep. 116.

[z] *Thomas* v. *Cook*, 2 B. & Al. 119.

statute 8 & 9 Vict. c. 106, which we may remember enacts that any surrender *in writing* of an interest in lands, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void in law unless made by deed.'

10. Assignment.

10. An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less [327] than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands 'for most purposes in the place of the assignor. The assignee is, however, not bound by all the covenants of the assignor, the general rule being that he is bound by all covenants which *run with the land*, but not by collateral covenants which do not run with the land. As if a lessee covenant for himself, his executors and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound;[a] yet if the lessee covenant for himself and his *assigns*, the assignee will be bound. And when the lessee covenants for himself, his executors and administrators, to reside upon the premises, this binds the assignee, for it runs with and is appurtenant to the thing demised.[b] But the assignee is in no case bound by the covenant of the lessee to build a house for the lessor anywhere *off the premises*, or to pay money to a stranger.[c] Covenants for quiet enjoyment, for further assurance, to pay rent and taxes, to build, repair and leave repaired, to cultivate the lands in a particular manner, not to carry on certain trades, to permit the lessor to have free passage through certain parts of the demised premises, have all been held to be covenants running with the land. So also to insure the premises, if there be a proviso that the sum recovered under the insurance shall be laid out in repairing the premises. But a covenant simply to insure without such proviso would seem to be personal only.[d] Covenants which result by implication of law also

[a] But see *Sampson* v. *Easterby*, 9 B. & Cr. 505.

[b] *Tatem* v. *Chaplin*. 2 H. Bl. 133.

[c] *Spencer's case*, 5 Rep. 16; *Mayho* v. *Brickhurst*, Cr. Jac. 438.

[d] *Vernon* v. *Smith*, 5 B. & Al. 1.

run with the land, as well as where they are formally expressed.'[e]

'The assignee is not bound by a covenant broken *before* the assignment.[f] And an assignment does not discharge the original lessee or his representatives from the covenant for payment of rent, or any other covenant whether running with the land or not, but he still remains liable to the lessor.[g] Nor even if the lessor recognise the assignee as his tenant, by acceptance of rent, is the original lessee discharged.[h] But the assignee of a lease is only liable on the covenants so long as his ownership lasts, and if he reassigns to another person he is completely discharged, and that notwithstanding the lessor have no notice of the assignment, or although the assignee be an indigent person and unable to perform the covenants.'[i]

'If instead of assigning the term, the lessee make an under-lease out of his interest, though the reservation be only of a single day, the under-lessee is not liable to the original lessee for rent or covenants, as an assignee of the whole term would have been.[j] But he cannot of course take irrespective of the covenants in the original lease, which run with the land, and will be liable to the usual landlord's remedies for the infraction of them. And a person contracting for an under lease is bound to inform himself of what the covenants in the lease are, otherwise if he enter and take possession he will be bound by them.'[k]

11. Defeazance.

11. A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated[l] or totally undone. And in this manner mortgages were, in former times, usually made; the mortgagor enfeoffing the mortgagee, and he, at the same time, executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed, at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by

[e] *Vyvyan* v. *Arthur*, 1 B. & Cr. 410.
[f] 2 Burr. 1271.
[g] *Rushden's case*, Dy. 41.
[h] *Orgill* v. *Kimshead*, 4 Taun. 642.
[i] *Paul* v. *Nurse*, 2 M. & Ry. 525.
[j] Dougl. 57, 174, 183.
[k] *Flight* v. *Barton*, 3 M. & K. 282; *Cosser* v. *Collinge*, 3 M. & K. 283.
[l] From the French verb *defaire*, *infectum reddere*.

the ancient law;[m] and, therefore, only indulged; no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like), were always liable to be recalled by defeazances made subsequent to the time of their creation.[n]

II. There yet remain to be spoken of some few conveyances which have their force and operation by virtue of the *statute of uses.*

Uses and trusts.

Uses and *trusts* are, in their origin, of a nature very similar, or rather exactly the same: answering more to the *fidei-commissum* than the *usus-fructus* of the civil law: which latter was the temporary right of using a thing, without having the ultimate property or full dominion of the substance.[o] But the *fidei-commissum,* which usually was created by will, was the disposal of an inheritance to one, in confidence that he [328] should convey it, or dispose of the profits, at the will of another. And it was the business of a particular magistrate, the *prætor fidei-commissarius,* instituted by Augustus, to enforce the observance of this confidence.[p] So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice; which occasioned that known division of rights by the Roman law, into *jus legitimum,* a legal right, which was remedied by the ordinary course of law; *jus fiduciarium,* a right in trust, for which there was a remedy in conscience; and *jus precarium,* a right in courtesy, for which the remedy was only by intreaty or request.[q] In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant,* that he should dispose of the land according to the intentions of *cestui que use,* or him to whose use it was granted, and suffer him to take the profits.[r] As, if

[m] Co. Litt. 236.
[n] Co. Litt. 237.
[o] Ff. 7, 1, 1.
[p] Inst. 2, tit. 23.
[q] Ff. 43, 26, 1; Bacon on Uses, 8°.
[r] Plowd. 352.

a feoffment was made to A. and his heirs, to the use of (or in trust for) B. and his heirs; here, at the common law, A. the *terre-tenant* had the legal property and possession of the land, but B. the *cestui que use* was, in conscience and equity, to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III.,[s] by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses: which the clerical chancellors of those times held to be *fidei-commissa*, and binding in conscience; and, therefore, assumed the jurisdiction which Augustus had vested in his *praetor*, of compelling the execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet, if a testator had enfeoffed another to his own use, and so was possessed of [329] the use only, such use was devisable by will. But we have seen how this evasion was crushed in its infancy, by statute 15 Ric. II. c. 5, with respect to religious houses.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes; particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till, at length, during our long wars in France, and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of Edward IV. (before whose time, lord Bacon remarks,[t] there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

[s] Stat. 50 Edw. III. c. 6; 1 Ric. II. c. 9; 1 Rep. 139.

[t] On Uses, 313.

Originally it was held that the chancery could give no relief but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir;[u] and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use.[v] But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king or queen, on account of their [330] dignity royal, nor any corporation aggregate, on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust.[w] And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use:[x] because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

On the other hand, the use itself, or interest of *cestui que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession: as annuities, ways, commons, and authorities *quæ ipso usu consumuntur*:[y] or whereof the seisin could not be instantly given.[z] 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions.[a] But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration.[b] 3. Uses were descendible according to the rules of the common law, in the case of

[u] Keilw. 42; Year-book, 22 Edw. IV. 6.

[v] Keilw. 46; Bacon of Uses, 312; Bacon of Uses, 346, 347.

[w] Bro. Abr. tit. *Feoffm. al uses*, 31, 40.

[x] 1 Rep. 122.

[y] 1 Jon. 127.

[z] Cro. Eliz. 401.

[a] 1 And. 37.

[b] Moor. 684.

inheritances in possession;[c] for in this and many other respects *equitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament;[d] for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention [331] of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestui que use* could not at common law alien the legal interest of the lands, without the concurrence of his feoffee;[e] to whom he was accounted by law to be only tenant at sufferance.[f] 5. Uses were not liable to any of the feudal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, &c., are the consequences of *tenure*, and uses are *held* of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use.[g] 6. No wife could be endowed, or husband have his curtesy, of a use:[h] for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the origin of modern jointures. 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestui que use*.[i] For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties which the ingenuity of the times (abounding in subtle disquisitions) deduced from this child of the imagination, when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord

[c] 2 Roll. Abr. 780.
[d] Bacon of Uses, 308, 312.
[e] Stat. 1 Ric. III. c. 1.
[f] Bro. Abr. ibid. 23.
[g] Jenk. 190.
[h] 4 Rep. 1; 2 And. 75.
[i] Bro. Abr. tit. *Executions*, 90. See now 1 & 2 Vict. c. 110, s. 11.

Bacon's complaint,[j] that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom [332] to bring his action, or who was the owner of it. The wife was defrauded of her dower; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestui que use*;[k] allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits;[l] made him liable to actions of waste;[m] established his conveyances and leases made without the concurrence of his feoffees;[n] and gave the lord the wardship of his heir, with certain other feudal perquisites.[o]

Statute of Uses.

These provisions all tended to consider *cestui que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII. c. 10, which is usually called the *Statute of Uses*, or, in conveyances and pleadings, the statute *for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of King Richard III.; who, having, when Duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the Crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an Act of Parliament was immediately passed,[p] which, ordained, that, where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestui que use* in like manner as he had the use. And so the statute of Henry VIII., after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be *seised* of lands, &c., to [333] the use, confidence, or trust, of any other person or body

[j] Use of the Law, 153.

[k] Stat. 50 Edw. III. c. 6; 2 Ric. II. sess. 2, 3; 19 Hen. VII. c. 15.

[l] Stat. 1 Ric. II. c. 9; 4 Hen. IV. c. 7 & 15; 11 Hen. VI. c. 3; 1 Hen. VII. c. 1.

[m] Stat. 11 Hen. VI. c. 5.

[n] Stat. 1 Ric. III. c. 1.

[o] Stat. 4 Hen. VII. c. 17; 19 Hen. VII. c. 15.

[p] 1 Ric. III. c. 5.

politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestui que use* into a legal instead of an equitable ownership, the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy, on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestui que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestui que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

[334] The various necessities of mankind induced also the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses, than upon

others. Hence it was adjudged, that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A. and B., after a marriage shall be had between them,[q] or to the use of A. and his heirs, till B. shall pay him a sum of money, and then to the use of B. and his heirs.[r] Which doctrine, when devises by will were again introduced, and considered as equivalent, in point of construction, to declarations of uses, was also adopted in favour of *executory devises.* But herein these, which are called *contingent* or *springing* uses, differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and, therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed for ever:[s] whereas, by an executory devise, the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee;[t] because, though that was forbidden by the common law in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were, before the statute, permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto;*[u] as, if A. make a feoffment to the use of his intended wife and her eldest son, for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both.[v] This is sometimes called a *secondary,* sometimes a *shifting* use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is

Springing uses.

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Shifting uses.

[q] 2 Roll. Abr. 791; Cro. Eliz. 439.
[r] Bro. Abr. tit. *Feoffm. al uses,* 30.
[s] 1 Rep. 134, 138; Cro. Eliz. 439.
[t] Pollexf. 78; 10 Mod. 423.
[u] Bro. Abr. tit. *Feoffm. al uses,* 30.
[v] Bacon of Uses, 351.

styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after marriage it is executed in the wife for life: and, if she dies without issue, the whole results back to him in fee.[w] It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow was a deed of defeazance coeval with the grant itself (and, therefore, esteemed a part of it), upon events specifically mentioned.[x] And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead.[y] And this was permitted, partly to indulge the convenience, and partly the caprice, of mankind; who (as Lord Bacon observes)[z] have always affected to have the disposition of their property, revocable in their own time, and irrevocable ever afterwards.

Resulting uses.

By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use;"[a] and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant, and, therefore, void.[b] And, therefore, on a feoffment to A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting that the instant the first use was executed in B., he became seised to the use of C., which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestui que use*. Again, as the statute mentions

[336]

[w] Bacon of Uses, 350; 1 Rep. 120.
[x] See page 327.
[y] Co. Litt. 237.
[z] On Uses, 316.
[a] Dyer, 155.
[b] 1 And. 37, 136.

only such persons as were *seised* to the use of others, this was held not to extend to term of years or other chattel interests, whereof the termor is not *seised*, but only *possessed*;[c] and, therefore, if a term of one thousand years be limited to A., to the use of (or in trust for) B., the statute does not execute this use, but leaves it as at common law.[d] And lastly (by more modern resolutions), where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust.[e]

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case, it was evident that B. was never intended by the parties to have any beneficial interest: and, in the second, the *cestui que use* of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that, though these were not *uses* which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed.[f] To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts;* and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.[g]

However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II. c. 3, having required that every declaration, assignment, or grant of any trust in lands or hereditaments (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will; the courts now consider a trust-estate (either when expressly declared, or resulting by such implication) as

[c] Bacon, Law of Uses, 335; Jenk. 244

[d] Poph. 76; Dyer, 369.

[e] 1 Eq. Cas. Ab. 383, 384.

[f] 1 Hal. P. C. 248.

[g] Vaugh. 50; Atk. 591. It is the practice to introduce only the names of the trustee and the *cestui que trust;* the estate being conveyed to A. and his heirs, *to the use of* A. *and his heirs*, in trust for B. and his heirs; and thus this important statute has been effectually repealed by the repetition of half-a-dozen words.—[CHRISTIAN.]

equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now more than a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice;[h] which, as *cestui que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances (by the express provision of the statute of frauds 'and of the more recent statute 1 & 2 Vict. c. 110'), to forfeiture, to leases and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law. 'Until the statute 3 & 4 Will. IV. c. 105, it was not, indeed,' subjected to dower more from a cautious adherence to some hasty precedents,[i] than from any well-grounded principle; 'but that statute now gives to widows whose marriage took place since December 31, 1833, dower out of lands to which their husbands were beneficially entitled in equity, for an estate of inheritance.' It has also been held not liable to escheat to the lord, in consequence of attainder or want of heirs;[j] because the trust could never be intended for his benefit. But let us now return to the statute of uses.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient [338] conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. This gave way to

12. A twelfth species of conveyance, called a ***covenant to stand seised to uses:*** by which a man seised of lands, cove- **12. Covenant to stand seised to uses.**

[h] 2 Freem. 43. [i] 1 Chanc. Rep. 254; 2 P. Wms. 640. [j] Hard. 494.

nants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here, the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land,[k] without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage, 'and it is now very seldom used.'

13. Bargain and sale.

13. A thirteenth species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands; which is a kind of a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such a bargain trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase;[l] or, as it has been well expressed,[m] the bargain first vests the use, and then the statute vests the possession. But, as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give: to prevent, therefore, clandestine conveyances of freeholds, it was enacted, in the same session of Parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and *enrolled* within six months in one of the courts of Westminster-hall, or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years were thought not worth regarding, as such interests were very precarious till about six years before; [339] which also occasioned them to be overlooked in framing the statute of uses; and therefore such bargains and sales are not directed to be enrolled. But how impossible it is to foresee and provide against *all* the consequences of innovations! This omission gave rise to

14. Lease and release.

14. A fourteenth species of conveyance, viz., by *lease and release;* first invented by Serjeant Moore, soon after the sta-

[k] Bacon, Use of the Law, 151. [l] Bacon, Use of the Law, 150.
[m] Cro. Jac. 696.

tute of uses, and ('until the recent statute 8 & 9 Vict. c. 106, which, we may recollect, enables freehold interests to be conveyed by grant') the most common of any; though very great lawyers (as, particularly, Mr. Noy, Attorney-General to Charles I.) formerly doubted its validity.[n] It was thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, was made by the tenant of the freehold to the lessee or bargainee. Now, this, without any enrolment, made the bargainor stand seised to the use of the bargainee, and vested in the bargainee the *use* of the term for a year: and then the statute immediately annexed the *possession*. He, therefore, being thus in possession, was capable of receiving a lease of the freehold and reversion; which, we have seen before, must be made to a tenant in possession: and, accordingly, the next day, a release was granted to him.[o] This was held to supply the place of livery of seisin; and so a conveyance by lease and release was said to amount to a feoffment.[p] 'By the statute 4 & 5 Vict. c. 21, the lease for a year, on which the whole title was formerly founded, was made unnecessary, provided the release specially referred to the statute itself as giving it this operation, and also in addition to its own stamp, bore the stamp of a lease for a year. This statutory release, operating as a lease and release, has, however, been superseded by the enactment of the statute 8 & 9 Vict. c. 106, above mentioned; and both forms of conveyance have thus, in truth, become extinct. For though a deed, by which a freehold estate is conveyed, may be occasionally denominated a release, yet it is really a deed of grant, and might be classed under the third species of original conveyances, and not among those derivative conveyances which operate under the statute of uses.'

15. Deeds of '*appointment or of revocation and new appointment of uses;*' hinted at in a former page, and founded on a previous power, reserved at the raising of the uses, to revoke such as were then declared.

15. Deeds of revocation and new appointment.

'Deeds in execution of powers of appointment reserved by previous deeds, or given by will, have assumed great importance in modern conveyancing, and require some notice here.

[n] 2 Mod. 252. [o] See Appendix II.
[p] Co. Litt. 270; Cro. Jac. 604.

Powers have been divided into such as are *collateral* and such as *relate to the land*. *Collateral* powers are those which are given to strangers, that is, to persons having neither a present nor a future estate or interest in the lands. Powers *relating to the lands* are those reserved or given to persons who have such an estate or interest. Powers of the latter kind are called appendant, or annexed to the estate, when the estate to be created by the power, is to take effect out of the estate to which the power is annexed, and during its continuance, as to make leases. A power in gross is one where the estate to be created does not take effect until after the determination of that to which it is annexed, as to jointure an after-taken wife. In the exercise of these powers the strictest attention is required to the mode of execution pointed out by the instrument creating the power. If a power be given to husband and wife to appoint, the survivor cannot do so alone; if a power is given to one to appoint by deed, he may not do it by will, and all formalities required by the deed of creation must be strictly adhered to. Powers of appointment may be confined to some class of individuals, as to appoint to or amongst the children of A.; and any deviation from the class specified, as for instance an appointment to a grandchild of A., will fail of effect. The quantity of the estate to be appointed may be also limited, as a power to appoint for life only; and any excess in the exercise of the power will be void.'

'Limitations made by virtue of a power are declarations of uses dependent on the seisin created by the deed reserving the power. The appointment itself *conveys* no estate, but it merely designates a use and a person to take it, in exercise of a right reserved by the creator of the power himself, or granted by him to some other person. The appointee is said to take under the instrument reserving or giving the power, exactly as if he had been actually named in that instrument. As an illustration of the meaning and effect of this principle, it may be mentioned that under the old law of dower, by the contrivance of giving to a man a power of appointment, instead of limiting the estate to him in fee, he was enabled to dispose absolutely of the land in exclusion of his wife's right of dower. Thus, if land were conveyed to A. (the feoffee to uses) and his heir, to such uses as B., who was the purchaser, should appoint, and in default of appointment to B. in fee, here B., if

he wanted to sell, might by the exercise of the power of appointment, exclude his wife's right of dower, which would have attached at once, had the estate been limited to the use of him and his heirs. For the purchaser C. came in under the original conveyance, and took, upon the appointment of B., the use to which A., the feoffee or releasee to uses stood seised, and which the statute executed in C., to the exclusion altogether of B., whose estate in fee in default of appointment never came into existence.'[q]

Revocation and new appointment.

'In deeds giving powers of appointment it is usual to declare that the power may be exercised either absolutely and irrevocably, or with the reservation of a new power of revocation. The power will be understood to have been exercised irrevocably, unless such power of revocation be expressly reserved. Any new appointment exercised under such reserved power will first revoke the former appointment, and the ground being thus cleared, will proceed to appoint new uses.'

Bargain and Sale at Common Law.

'Another kind of assurance, different from any hitherto mentioned, is that founded upon a power given by a will or by an Act of Parliament, as in the instance of the Land-tax Redemption Acts. The words of conveyance used in deeds of this kind are usually "bargain and sell," but the estate passes by force of the will or Act of Parliament, the person who executes the power, merely nominating the party to take the estate.[r] A power of this kind differs from one which operates by virtue of the statute of uses, inasmuch as in the latter case there must be some person seised to uses, which in the former is not required; and this species of conveyance is termed a *bargain and sale at common law*, to distinguish it from a bargain and sale operating by the statute of uses. In wills of copyholds which are intended to be sold, it is usual for the testator to direct his executors or trustees to sell them, but without devising the estate to them, which would involve the necessity of their being admitted under the devise as tenants to the lord. But under the direction or power thus given, they are able to sell at once to a purchaser, and thus one admittance only is necessary. The estate passed by the common law bargain and sale to the bargainee, is one upon which uses may be declared, whereas the estate passing by the other

[q] *Ray* v. *Pung*, 5 B. & Ad. 561.

[r] 1 Sug. Powers, 1.

mode of conveyance is itself an use upon which no further use can be grafted.[s] The common law bargain and sale also, does not require enrolment (as does the other in case it pass a freehold interest), unless, indeed, the will or Act of Parliament by which the power is given, should contain an injunction to that effect.'

Statutory Deeds.

'We may also notice here another anomalous class of deeds, operating as conveyances, which do not fall under any of the preceding heads. These are deeds of a special character, owing their entire efficacy to the express provisions of some Act of Parliament. For instance, by the Lands' Clauses Consolidation Act 1845, which is now almost invariably incorporated in railway and canal and bridge Acts, and other statutes to effect the object of which compulsory powers of acquiring lands are necessary, the promoters of any undertaking, who have contracted for the purchase of lands in conformity with the provisions of the Act, and cannot afterwards obtain a satisfactory conveyance of the lands, through defect of title in the owner or other cause, are enabled, after having duly deposited in the Bank of England the purchase or compensation money for the lands, to execute a deed-poll, containing a recital of the purchase, and the names of the parties from whom the purchase was made, the deposit of the money, and the failure of the owner to convey, and upon the execution of this deed the estate and interest of the party with whom the agreement for the purchase has been made, and of all parties whose interests he might have conveyed, became vested absolutely in the promoters of the undertaking.'

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Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or incumber, lands, and to *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. Obligation or bond.

1. An *obligation* or bond, is a deed[t] whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio:*

[s] 1 Prest. Abst. 143; 1 Shep. Touch. 227. [t] See Appendix V.

but there is generally a condition added, that, if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute, at law, and charges the obligor, while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. 'The heir at common law is not, unless named in the bond, bound by it;[u] and, therefore, might formerly, in such a case, have kept the lands to which he succeeded, and refused to pay the ancestor's debts. Now, however, by the statute 3 & 4 Will. IV. c. 104, when any person dies seised of real estate, freehold or copyhold, the same is assets, whether in the hands of his heir or devisee, for the payment of his just debts, whether these be due on simple contract or specialty.' How a bond affects the personal property of the obligor, will be more properly considered hereafter.

Illegal conditions.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional: for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible, by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation [341] is saved: for no prudence or foresight of the obligor could

[u] Touch. 369. 'The heir, when named in the obligation, is a debtor, not liable to pay the debt under all circumstances, but liable to the extent of the lands descended. He is not restrained from alienation, but after alienation he is *personally liable* to pay his ancestor's debt to the amount of the value of the estate he has alienated.' (*Richardson* v. *Horton*, 7 Beav. 124.)

guard against such a contingency.[v] On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law,[w] the stat. 4 & 5 Ann. c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

2. Recognizance.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorised,[x] with condition to do some particular act; as, to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond; the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is, "that A. B. doth acknowledge to owe to our lady the queen, to the plaintiff, to C. D., or the like, the sum of ten pounds;" with condition to be void on performance of the thing stipulated; in which case the queen, the plaintiff, C. D. &c., is called the cognizee, "*is cui cognoscitur;*" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit.*" This being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though [342] the effects of it are greater than a common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record.[y] There are also other recognizances of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. VIII. c. 6, which have been already explained and shown to be a charge upon real property.

[v] Co. Litt. 206.
[w] 2 Keb. 553, 555; Salk. 596, 597.
[x] Bro. Abr. tit. *Recognizance*, 8-14.
[y] Stat. 29 Car. II. c. 3.

'Of a nature somewhat similar to a recognizance, is a judgment of one of the superior courts at Westminster, which at common law operates as a charge upon all freehold property, of which the judgment debtor is seised at the date of the judgment. Such a judgment is now, by statute 1 & 2 Vict. c. 110, a charge upon all real property whatever, including copyholds, to which the persons against whom the judgment is entered up, is at the time, or at any time afterwards, entitled whether at law or in equity, or over which such person has any disposing power which he might, without the assent of any other person, exercise for his own benefit. The mode most usually resorted to in practice, of giving a creditor a lien upon his debtor's real property, is, where an action has been commenced, by giving a *cognovit actionem*, or confession of the plaintiff's right of action, or by giving a warrant of attorney to confess a judgment; either of which instruments, the statute I have mentioned requires to be executed with certain formalities, in order to guard the person who gives the cognovit or warrant of attorney from imposition, the chief of these being the presence of the attorney of the debtor to explain the nature and effect of the proceeding, and attest the due execution of the instrument. When judgment is entered up in pursuance either of the cognovit or warrant of attorney, it becomes, as we have seen, a charge upon the lands of the debtor. But as to purchasers, mortgagees and creditors, such judgment does not affect them unless the same is registered in the Court of Common Pleas, and this, notwithstanding any notice they may have of it from other sources. This registration holds good as to subsequent purchasers, mortgagees or creditors, only for five years, when it must be re-registered, in order to bind them. In other words, a purchaser, mortgagee or creditor, is not bound by a judgment which does not appear on the register within the five years preceding his purchase or loan.[z] But as between the debtor and his creditor, to whom he executes the warrant, it is a valid charge, binding the debtor's lands, and comes properly under the head of matter *in pais*, by which estates may be affected.'

Judgments.

3. A defeazance, on a bond, or recognizance, or judgment

[z] 2 & 3 Vic. c. 11, s. 4; 18 & 19 Vic. c. 15, ss. 5, 6.

3. Defeazance.

recovered, is a condition, which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed.[a] This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

These are the principal species of deeds or matter *in pais*, by which estates may be either conveyed or at least affected. As regards conveyances, there is certainly one palpable defect, the want of sufficient notoriety; so that purchasers or creditors cannot know with any absolute certainty, what the estate and the title to it in reality are, upon which they are to lay out or to lend their money. In the ancient feudal method of conveyance (by giving corporal seisin of the lands), this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances, since the disuse of the old Saxon custom of transacting all conveyances at the county-court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery,[b] and the failure of the general register established by King Richard the First, for the starrs or mortgages made to Jews, in the *capitula de Judæis*, [343] of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland, every act and event regarding the transmission of property, is regularly entered on record. And some of our own provincial divisions, particularly the extensive county of York, and the populous county of Middlesex, have prevailed with the legislature[c] to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it has been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention

Registry.

[a] Co. Litt. 237; 2 Sand. 47.

[b] Hickes, *Dissertat. Epistolar.* 9.

[c] Stat. 2 & 3 Ann. c. 4; 6 Ann. c. 35; 7 Ann. c. 20; 8 Geo. II. c. 6.

and omissions of parties, than prevented by the use of registers.'

'Of late years the propriety, if not necessity, as some allege, of establishing a general registry of deeds affecting real property, has been the subject of much discussion, both among the members of the legal profession and in the Houses of Parliament. Opinions on this most important subject are of course much divided, and the examination of the whole question has recently been referred by the Crown to a commission, whose report may be shortly anticipated.'

CHAPTER XXI.

OF ALIENATION BY MATTER OF RECORD.

[344] ASSURANCES by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private Acts of Parliament. 2. The sovereign's grants. 'To this class belonged those now abolished modes of assurance,'—3. Fines. 4. Common recoveries; 'and to the same class must now be referred,—5. Vesting orders of the Court of Chancery, made under the authority of different modern statutes, by virtue of which property is transferred without any other conveyance from one individual to another; and likewise confirmations of awards made by the Inclosure Commissioners, and orders made by them for the exchange and partition of lands. The commutations of tithes and the enfranchisements of copyholds made under the authority of the Tithe Commutation and Copyhold Commission, may also be considered as coming under this head, as also orders and proceedings in bankruptcy and insolvency, by which, as we have already had occasion to remark, and as we shall hereafter see, property may be at once transferred without deed or conveyance.'

I. Private Acts of Parliament.

I. Private *Acts of Parliament* have of late years become a very common mode of assurance. For it may sometimes happen, that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances (a confusion unknown to the simple conveyances of the common law); so that it may be out of the power of either the courts of law or equity to relieve the owner. Or it may some-

times happen, that, by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power (as, letting leases, making a jointure for a wife, or the like), which power cannot be given him by the ordinary judges either in common law or equity. Or, it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities, who are not bound by any judgments or decrees of the ordinary courts of justice. In these or other cases of the like kind, the transcendent power of parliament is called in, to cut the [345] Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the Restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it,[a] every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king, at the close of the session, to remark,[b] that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are, however, at present carried on, in both houses, with great deliberation and caution; particularly in the House of Lords, they are usually referred to two judges to examine and report the fact alleged, and to settle all technical forms. Nothing, also, is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter: unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon

[a] Lord Clar. Contin. 162.

[b] Lord Clar. Contin. 163.

infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this Act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named: though it has been held, that even if such saving be omitted, the act shall bind none but the parties.[c]

[346] A law, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not, therefore, allowed to be a *public*, but a mere *private* statute: it is not printed or published among the other laws of the session; it has been relieved against, when obtained upon fraudulent suggestions;[d] it has been held to be void, if contrary to law and reason;[e] and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. Royal grants.

II. The *sovereign's grants* are also matter of public record. For, as St. Germyn says,[f] the king's excellency is so high in the law, that no freehold may be given to the king, nor derived

[c] Co. 138; Godb. 171. 'A recent statute (19 & 20 Vict. c. 120) will probably render private Acts of Parliament much less frequent than they have hitherto been. This Act empowers the Court of Chancery, with the consent of certain parties interested, to authorise leases and sales of settled estates. When there is a tenant-in-tail of full age, the consent of such tenant-in-tail, and the first of them if more than one, and of all persons in existence having beneficial interests prior to the estate-tail, and of all trustees having interests in behalf of unborn children prior to the estate-tail, is necessary. In all other cases, all persons whatsoever having beneficial interests under the settlement, and trustees having interests in behalf of unborn children, are required to consent. An order may, however, be made without consent, saving the rights of non-consenting parties. No application can be made under the statute when a similar application has been already rejected by Parliament; nor may the court authorise any act which would not have been authorised by the settlor. The working of this Act remains to be seen. In many of the more usual cases of difficulty arising from the accidental omission in settlements of powers of sale or of powers to grant leases, the statute may be found to provide a simple and inexpensive remedy.'

[d] *Richardson* v. *Hamilton*, Canc. 8 Jan. 1733; *McKenzie* v. *Stuart*, Dom. Proc. 13 Mar. 1754; Cru Dig. v. 23; *Biddulph* v. *Biddulph*, Cru. Dig. v. 26.

[e] 4 Rep. 12.

[f] Dr. & Stud. b. 1, d. 8.

from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the grants of the Crown must pass, and be transcribed and enrolled; that the same may be narrowly inspected by the officers of the Crown, who will inform the sovereign if anything contained therein is improper or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters, or letters *patent*, that is, open letters, *literæ patentes:* so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the sovereign to all his subjects at large. And therein they differ from certain other letters of the sovereign, sealed also with the great seal, but directed to particular persons, and for particular purposes; which, therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close, literae clausae,* and are recorded in the *close-rolls,* in the same manner as the others are in the *patent-rolls.*

Formerly grants, or letters patent, were required in the first place to be passed by *bill:* which was prepared by the attorney and solicitor-general, in consequence of a warrant from the Crown; and was then signed, that is, superscribed at the top, with the king's own *sign manual,* and sealed with the *privy signet,* which is always in the custody of the principal secretary of state; and then sometimes it immediately passed under the great seal, in which case the patent was subscribed in these words, "*per ipsum regem,* by the king himself,"[g] or otherwise, the course was to carry an extract of the bill to the keeper of the *privy seal,* who made out a writ or warrant thereupon to the Chancery; so that the sign manual was the warrant to the privy seal, and the privy seal was the warrant to the great seal: and in this last case the patent was subscribed "*per breve de privato sigillo,* by writ of privy seal."[h] 'But now, under the statute 14 & 15 Vict. c. 82, which abolished the offices of the clerk of the signet and privy seal, a warrant under the sign manual may be addressed to the Lord Chancellor, commanding him to cause letters patent to be passed

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[g] 2 Rep. 176; 9 Rep. 18.

[h] Ibid.; 2 Inst. 555.

under the great seal. This warrant must be prepared by the attorney or solicitor-general, setting forth the proposed letters patent, and must be countersigned by one of the principal secretaries of state, and sealed with the privy seal.' There are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy* seal.

The *manner* of granting by the sovereign does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the Crown, *at the suit of the grantee*, shall be taken most beneficially *for* the sovereign, and *against* the party; whereas the grant of a subject is construed most strongly *against the grantor*. Wherefore, it is usual to insert in the royal grants, that they are made, not at the suit of the grantee, but "*ex speciali gratiâ, certâ scientiâ, et mero motu regis;*" and then they have a more liberal construction.[i] 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted.[j] But the grant of the Crown shall not enure to any other intent than that which is precisely expressed in the grant. As, if the sovereign grants land to [348] an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant.[k] 3. When it appears, from the face of the grant, that the sovereign is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void.[l] For instance, if the Crown grants lands to one and his *heirs male*, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither

[i] Finch, L. 100; 10 Rep. 112.

[j] Co. Litt. 56.

[k] Bro. Abr. *Patent*, 62; Finch, L. 110.

[l] Freem. 172. 2 Jac. & W. 342.

is it a fee-simple, as in common grants it would be, because it may reasonably be supposed that the sovereign meant to give no more than an estate-tail:[m] the grantee is therefore (if anything) nothing more than tenant at will.[n] And to prevent deceits on the Crown, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6, that no grant of the sovereign shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

III. Fines.

III. We are next to consider a species of assurance, 'formerly very usual,' which was also of record, viz., a *fine* of lands and tenements. 'The Act 3 & 4 Will. IV. c. 74, has abolished fines, and substituted simpler methods of effecting the ends for which they were used, but their nature and operation are still highly necessary to be understood, and I shall therefore proceed to' explain, 1. The *nature* of a fine; 2. Its several *kinds;* and 3. Its *force* and *effect.*

1. Nature of a fine.

1. A fine has been said to be a feoffment of record; though it might with more accuracy have been called an acknowledgment of a feoffment on record. By which is to be understood, that it had at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it was one of those methods of transferring estates of freehold by the common law, in which livery of seisin was not necessary to be actually given; the supposition and acknowledgment thereof [349] in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine might have been described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question became, or were acknowleged to be, the right of one of the parties. In its origin it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were introduced for the sake of obtaining the same security.

A fine was so called because it put an *end*, not only to the

[m] Finch, 101, 102.

[n] Bro. Abr. tit. *Estates*, 34; tit. *Patents*, 104; Dyer, 270; Dav. 45.

suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament, 18 Edw. I. "*Non in regno Angliæ providetur, vel est, aliqua securitas major vel solennior, per quam aliquis statum certiorem habere possit, neque ad statum suum verificandum aliquod solennius testimonium producere, quam finem in curiâ domini regis levatum: qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, et hac de causâ providebatur.*" Fines, indeed, are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton in the reigns of Henry II. and Henry III., as things then well known and long established; and instances have been produced of them even prior to the Norman invasion. So that the statute 18 Edw. I., called *modus levandi fines*, did not give them origin, but only declared and regulated the manner in which they should be levied, or carried on. And that is as follows:

1. Præcipe.

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1. The party to whom the land was to be conveyed or assured, commenced an action or suit at law against the other, generally an action of covenant, by suing out a writ or a *præcipe*, called a writ of covenant: the foundation of which was a supposed agreement or covenant, that the one should convey the lands to the other; on the breach of which agreement the action was brought. On this writ there was due to the Crown, by ancient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value. The suit being thus commenced, then followed,

2. Licentia concordandi.

2. The *licentia concordandi*, or leave to agree the suit. For, as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered if he now deserted it without licence, he therefore applied to the court for leave to make the matter up. This leave was readily granted, but for it there was also another fine due to the king by his prerogative, which was an ancient revenue of the Crown, and was called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before mentioned. And it was as

much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three-twentieths of the supposed annual value.

3. Concord.

3. Next came the *concord*, or agreement itself, after leave obtained from the court: which was usually an acknowledgment from the deforciants (or those who kept the other out of possession) that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the *cognizor*, and he to whom it was levied, the *cognizee*. This acknowledgment was to be made either openly in the court of Common Pleas, or before the lord chief justice of that court, or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem;* which judges and commissioners were bound, by statute 18 Edw. I. st. 4, to take care that the cognizors were of full age, sound memory, and out of prison. If there were any feme-covert among the cognizors, she was privately examined whether she did it willingly and freely, or by compulsion of her husband.

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By these acts all the essential parts of a fine were completed; and, if the cognizor died the next moment after the fine was acknowledged, provided it was subsequent to the day on which the writ was made returnable, still the fine might be carried on in all its remaining parts: of which the next was,

4. Note of the fine.

4. The *note* of the fine, which was only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This was enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

5. Foot of the fine.

5. The fifth part was the *foot* of the fine, or conclusion of it; which included the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there were indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*haec est finalis concordia*, this is the final agreement," and then reciting the

whole proceeding at length. And thus the fine was completely levied at common law.

By several statutes still more solemnities were superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I. [352] c. 1, the note of the fine was to be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas ceased. By 5 Hen. IV. c. 14, and 23 Eliz. c. 3, all the proceedings on fines, either at the time of acknowledgment, or previous, or subsequent thereto, were required to be enrolled of record in the court of Common Pleas. By 1 Rich. III. c. 7, confirmed and enforced by 4 Hen. VII. c. 24, the fine, after engrossment, was to be openly read and proclaimed in court (during which all pleas ceased) sixteen times; viz., four times in the term in which it was made, and four times in each of the three succeeding terms; which was reduced to once in each term by 31 Eliz. c. 2; and these proclamations were endorsed on the back of the record. It was also enacted by 23 Eliz. c. 3, that the chirographer of fines should every term write out a table of the fines levied in each county in that term, and should affix them in some open part of the court of Common Pleas all the next term: and should also deliver the contents of such table to the sheriff of every county, who was, at the next assizes, to fix the same in some open place in the court, for the more public notoriety of the fine.

Proclamation of fines.

1. Fine *come ceo.*

2. Fines thus levied were of four kinds: 1. What in our law French is called a fine "*sur cognizance de droit, come ceo que il ad de son done;*" or, a fine upon acknowledgment of the right of the cognizee, as that which he had of the gift of the cognizor. This was the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledged in court a former feoffment or gift in possession, to have been made by him to the plaintiff. This fine was therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance was rather a confession of a [353] former conveyance, than a conveyance then originally made;

for the deforciant or cognizor acknowledged, *cognovit*, the right to be in the plaintiff, or cognizee, as that which he had *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum*," or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This was commonly used to pass a *reversionary* interest, which was in the cognizor. For of such reversions there could be no feoffment, or donation with livery, supposed; as the possession during the particular estate belonged to a third person. It was worded in this manner: "that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs that the reversion, after the particular estate determines, shall go to the cognizee." 3. A fine "*sur concessit*" was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this might be done reserving a rent, or the like: for it operated as a new grant. 4. A fine "*sur done, grant, et render*," was a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c., and the fine *sur concessit*: and might be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo*, &c., conveyed nothing but an absolute estate, either of inheritance or at least of freehold. In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again, or rendered, to the cognizor, or perhaps to a stranger, some other estate in the premises. But the first species of fine, *sur cognizance de droit come ceo*, &c., was the most used, as it conveyed a clean and absolute freehold, and gave the cognizee a seisin in law, without any actual livery; and was therefore called a fine executed, whereas the others were but executory.

2. Fine *sur cognizance de droit.*

3. Fine *sur concessit.*

4. Fine *sur done, grant, et render.*

3. We are next to consider the *force* and *effect* of a fine. These principally depended on the common law, and the two statutes 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. The ancient common law, with respect to this point, is very forcibly declared by the statute 18 Edw. I., in these words: "And the reason why such solemnity is required in the passing of a fine is this: because the fine is so high a bar, and of so great

3. Effect of fine.

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force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the fine levied; unless they put in their claim on the foot [o] of the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was abolished for a time by a statute made in 34 Edw. III. c. 16, which admitted persons to claim and falsify a fine, at any indefinite distance; whereby, as Sir Edward Coke observes, great contention arose, and few men were sure of their possessions, till the parliament, held 4 Hen. VII., reformed that mischief, and excellently moderated between the latitude given by the statute and the rigour of the common law. For the statute then made restored the doctrine of non-claim, but extended the time of claim. So that, by that statute, the right of all strangers whatsoever was bound, unless they made claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as were not of whole mind; who had five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

It seems to have been the intention of that politic prince, King Henry VII., to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay [355] them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar (which they were expressly declared *not* to be by the statute *De Donis*), the statute 32 Henry VIII. c. 36 was thereupon made; which removed all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands had been entailed, should be a perpetual bar

[o] *Sur la pie*, as it is in the Cotton MS., and not *pur le pais*, as printed by Berthelet, and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action. 2. By entering such claim on the record at the *foot* of the fine. 3. By entry on the lands. 4 By continual claim. (2 Inst. 518.)

to them and their heirs claiming by force of such entail: unless the fine were levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestor, assigned to her in tail for her jointure; or unless it were of lands entailed by Act of Parliament or letters patent, and whereof the reversion belonged to the Crown.

From this view of the common law, regulated by these statutes, it appears that a fine was a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine were *parties*, *privies*, and *strangers*.

Parties to a fine. The *parties* were, either the cognizors, or cognizees, and these were immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And, indeed, as this was almost the only act that a *feme-covert*, or married woman, was permitted by law to do (in which moreover she was privately examined as to her voluntary consent, which removed the general suspicion of compulsion by her husband), it was, therefore, the usual and almost the only safe method, whereby she could join in the sale, settlement, or incumbrance of any estate.

Privies. Privies to a fine were such as were any way related to the parties who levied the fine, and claimed under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail, subsequent to the statute of Henry the Eighth, the vendee, the devisee, and all others who must have made title by the persons who levied the fine. For the act of the ancestor bound the heir, and the act of the principal his substitute, or such as claimed under any conveyance made by him subsequent to the fine so levied. [356]

Strangers to a fine. Strangers to a fine were all other persons in the world, except only parties and privies. And these were also bound by a fine, unless, within five years after proclamations made, they interposed their claim; provided they were under no legal impediments, and had then a present interest in the estate. **Bar by non-claim.** The impediments, as has before been said, were coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons who were thus incapacitated to prosecute their rights, had five years allowed them to put in their claims after such impediments were removed. Persons, also, that had not a

present, but a future interest only, as those in remainder or reversion, had five years allowed them to claim in, from the time that such right accrued. And if within that time they neglected to claim, or (by the statute 4 Ann. c. 16) if they did not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever were barred of whatever right they might have, by force of the statute of non-claim.

Parties to fine must have an interest.

But, in order to make a fine of any avail at all, it was necessary that the parties should have some interest or estate in the lands to be affected by it. Else it had been possible that two strangers, by a mere confederacy, might, without any risk, have defrauded the owners by levying fines of their lands; for, if the attempt were discovered, they could be no sufferers, but would only have remained *in statu quo:* whereas, if a tenant for life levied a fine, it was an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. It was not, therefore, to be supposed that such tenants would frequently run so great a hazard; but if they did, and the claim was not duly made within five years after their respective terms expired, the estate was for ever barred by it. Yet where a stranger, whose presumption could not thus be punished, officiously interfered in an estate which in [357] nowise belonged to him, his fine was of no effect, and might at any time be set aside (unless by such as were parties or privies thereunto) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who has only a chattel interest, and no freehold in the land, levied a fine, it operated nothing, but was liable to be defeated by the same plea. Wherefore, when a lessee for years was disposed to levy a fine, it was usual for him to make a feoffment first, to displace the estate of the reversioner, and create a new freehold by disseisin. And thus much for the conveyance or assurance by fine; which not only, like other conveyances, bound the grantor himself and his heirs; but also all mankind, whether concerned in the transfer or no, if they failed to put in their claims within the time allotted by law.

IV. Common recoveries.

IV. Another species of assurance, by matter of record, 'now also abolished by statute 3 & 4 Will. IV. c. 74,' was a *common recovery.* Concerning the origin of which it was formerly

observed, that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law, in 12 Edw. IV., in order to put an end to all fettered inheritances, and bar not only estates-tail, but also remainders and reversions expectant thereon. I am now, therefore, only to consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

1. Nature of common recovery.

1. And, first, the *nature* of it, or what a common recovery was. A common recovery was so far like a fine, that it was a suit or action, either actual or fictitious; and in it the lands were *recovered* against the tenant of the freehold, which recovery, being a supposed adjudication of the right, bound all persons, and vested a free and absolute fee-simple in the recoveror. A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student who is not yet acquainted with the course of judicial proceedings, which cannot be [358] thoroughly explained till treated of at large in the third book of these Commentaries. However, I shall endeavour to state its nature and progress as clearly and concisely as I can, avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding must bring an action against him for the lands; and he accordingly sued out a writ, called a *præcipe quod reddat*, because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant, Golding, alleged that the defendant Edwards, (here called the tenant), had no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited: whereupon the tenant appeared, and called upon one Jacob

Morland, who was supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prayed, that the said Jacob Morland might be called in to defend the title which he had so warranted. This was called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland was called the *vouchee*. Upon this, Jacob Morland, the vouchee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *imparl*, or confer with the vouchee in private, which was (as usual) allowed him. And soon afterwards the demandant, Golding, returned to court, but Morland, the vouchee, disappeared, or made default. Whereupon judgment was given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, [359] Edwards, who was now the recoveree: and Edwards had judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; agreeably to the doctrine of warranty mentioned in the preceding chapter. This was called the recompense, or *recovery in value*. But, Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, was called the *common vouchee*), it is plain that Edwards had only a nominal recompense for the lands so recovered against him by Golding; which lands were now absolutely vested in the said recoveror by judgment of law, and seisin thereof was delivered by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee-simple, from Edwards, the tenant-in-tail, to Golding, the purchaser.

Double voucher.

The recovery, here described, was with a *single* voucher only; but sometimes it was with *double*, *treble*, or farther voucher, as the exigency of the case might require. And, indeed, it was usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to any indifferent person, against whom the *præcipe* was brought; and then he vouched the tenant-in-tail, who vouched over the common vouchee. For, if a recovery were had immediately against tenant-in-tail, it barred only such estate in the premises of which he was then actually seised; whereas if the recovery was had against another person, and the tenant-in-tail was vouched, it barred every latent right and interest

which he might have in the lands recovered. If Edwards therefore were tenant of the freehold in possession, and John Barker were tenant-in-tail in remainder, here Edwards first vouched Barker, and then Barker vouched Jacob Morland, the common vouchee, who was always the last person vouched, and always made default: whereby the demandant, Golding, recovered the land against the tenant, Edwards, and Edwards recovered a recompense of equal value against Barker, the first vouchee; who recovered the like against Morland, the common vouchee, against whom such ideal recovery in value was always ultimately awarded. [360]

This supposed recompense in value was the reason why the issue in tail was held to be barred by a common recovery. For, if the recoveree had obtained a recompense in lands from the common vouchee (which there was a possibility in contemplation of law, though a very improbable one, of his doing), these lands would have supplied the place of those so recovered from him by collusion, and would have descended to the issue in tail. This reason also held with equal force, as to *most* remainder-men and reversioners; to whom the possibility remained and reverted, as a full recompense for the reality, which they were otherwise entitled to; but it did not *always* hold; and, therefore, the judges were *astuti* in inventing other reasons to maintain the authority of recoveries. And, in particular, it was said that, though the estate-tail was gone from the recoveree, yet it was not *destroyed*, but only *transferred;* and still subsisted, and ever continued to subsist (by construction of law) in the recoveror, his heirs and assigns: and, as the estate-tail so continued to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail could never take place.

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2. Force and effect of recoveries.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to have been an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant-in-tail might, by this method of assurance, have conveyed the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20, no recovery had against

tenant-in-tail, of the king's gift, whereof the remainder or [362] reversion was in the king, barred such estate-tail, or the remainder or reversion of the Crown. And by the statute 11 Hen. VII. c. 20, no woman, after her husband's death, could suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. And by statute 14 Eliz. c. 8, no tenant for life, of any sort, could suffer a recovery, so as to bind those in remainder or reversion. For which reason, if there were tenant for life, with remainder in tail and other remainders over, and the tenant for life was desirous to suffer a valid recovery; either he, or the tenant to the *præcipe* by him made, must have *vouched* the remainder-man in tail, otherwise the recovery was void: but if he did vouch such remainder-man, and he appeared and vouched the common vouchee, it was then good; for, if a man was vouched and appeared, and suffered the recovery to be had against the tenant to the *præcipe*, it was as effectual to bar the estate-tail as if he himself were the recoveree.

In all recoveries it was necessary that the recoveree, or tenant to the *præcipe*, as he was usually called, should be actually seised of the freehold, else the recovery was void. For all actions, to recover the seisin of lands, must have been brought against the actual tenant of the freehold, else the suit lost its effect: since the freehold could not be recovered of him who had it not. And though these recoveries were in themselves fabulous and fictitious, yet it was necessary that there should be *actores fabulæ* properly qualified. But the nicety thought by some practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, was removed by the provisions of the statute 14 Geo. II. c. 20, which enacted, with a retrospect and conformity to the ancient rule of law, that, though the legal freehold were vested in lessees, yet those who were entitled to the next freehold estate in remainder or reversion, might make a good tenant to the *præcipe*;—that, though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet, if it were in the same term, the recovery should be valid in law;—and that, though the recovery itself did not appear to [363] be entered, or were not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of

the recovery, should, after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery had been duly suffered. And this may suffice to give the student a general idea of common recoveries.

Deeds to *lead* the uses.

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they were levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enured only to the use of him who levied or suffered them. And if a consideration appeared, yet, as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveyed an absolute estate, without any limitations, to the cognizee; and as common recoveries did the same to the recoveror, these assurances could not have been made to answer the purpose of family settlements (wherein a variety of uses and designations is very often expedient), unless their force and effect had been subjected to the direction of other more complicated deeds, wherein particular uses could be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, might be applied and directed to give efficacy to an infinite variety of movements in the vast and intricate machine of a voluminous family settlement. And if these deeds were made previous to the fine or recovery, they were called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A., tenant-in-tail, with reversion to himself in fee, would settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee; this is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine (or if there were any intermediate remainders, to suffer a recovery) to E., and directed that the same should enure to the uses in such settlement mentioned. This was then a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, enured to the uses so specified, and no other. For though E., the cognizee or recoveror, had a fee-simple vested in himself by the fine or recovery; yet, by the operation of [364] this deed, he became a mere instrument or conduit-pipe, seised only *to the use* of B. C., and D., in successive order: which use was executed immediately, by force of the statute

of uses. Or, if a fine or recovery was had without any previous settlement, and a deed were *afterwards* made between the parties *declaring* the uses to which the same should be applied, this was equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by statute 4 & 5 Ann. c. 16, it was enacted that indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, should be good and effectual in law, and the fine and recovery should enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. II. c. 3, to the contrary.

To such awkward shifts, such subtile refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *De Donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Modern courts of justice, indeed, adopted a more manly way of treating the subject; by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant-in-tail was enabled to alien his lands. 'During the last century,' when the ill consequences of fettered inheritances were generally seen and allowed, and the utility and expediency of setting them at liberty were apparent, it was often wished that the process of this conveyance should be shortened and rendered less subject to niceties, by either totally repealing the statute *De Donis*; which, perhaps, by reviving the old doctrine of conditional fees, might have given birth to many litigations: or, by vesting in every tenant-in-tail of full age the same absolute fee-simple at once, which he might obtain whenever he pleased, by the collusive fiction of a common recovery; (though this, 'it was argued on the other side, would' bear hard upon those in remainder or reversion by abridging the chances they would otherwise frequently have, as no recovery could be suffered in the intervals between term and term, which sometimes continued for nearly five months together): or lastly, by empowering the tenant-in-tail to bar the estate-tail by a solemn deed, to be made in term time, and enrolled in some court of

record; which was liable to neither of the other objections, and 'for which a precedent was afforded' by the usage of the American colonies, and 'which harmonised with the' decisions of our own courts of justice (which allowed a tenant-in-tail, without fine or recovery, to appoint his estate to any *charitable* use), 'and was warranted by' the statute 21 Jac. I. c. 19, which, in case of a bankrupt tenant-in-tail, empowered his commissioners to sell the estate at any time, by deed indented and enrolled.[p]

Fines and Recoveries Act.

'Fines and recoveries continued, however, to flourish in unabated exuberance until the reign of William IV., when a strong impulse in favour of law reform was communicated to the legislature. Amongst the many Acts passed at the commencement of that reign having this object in view, none has been found more successful in operation, or has obtained greater credit as a triumph of legislative skill than the Fines and Recoveries Act,[q] of which I shall now proceed to give an account.'

'Its first enactment is that after the 31st of December, 1833, no fine shall be levied or recovery suffered, except when the preliminary proceedings necessary for these purposes had been before that day actually commenced. The statute next provides for the fulfilment of covenants entered into previous to the day specified, for the leyying of fines and suffering recoveries, and by a legislative fiat, heals all errors and defects in those already completed, thus drying up at once a prolific source of doubts and difficulties which formerly encumbered the titles of estates. It also declares that all warranties of lands made by tenants-in-tail after December 31st, 1833, shall be absolutely void against the issue in tail and those in remainder.'

'The ground being thus, as it were, cleared, a general enabling clause follows, enacting that after the 31st December, 1833, the day named for the cessation of fines and recoveries, every actual tenant-in-tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of the lands entailed, either for a fee-simple absolute or any less estate, as against all persons claiming either under the entail,

[p] Transferred from pp. 360–361, of Bl. Com. v. ii.
[q] 3 & 4 Will. IV. c. 74, s. 19.

or in remainder, or reversion, including the Crown,[r] saving the rights of all persons having estates prior to the estate-tail so disposed of, and all others except those against whom the disposition is by the Act authorised to be made. A similar power of disposition, as against remainder-men or reversions, is given to the tenants-in-tail, whose estate has been converted into a base-fee, so as to enlarge such base-fee into a fee-simple absolute.'

'Thus is the tenant-in-tail, whether actual or one whose estate has been converted into a base-fee, placed in most respects on a par with the tenant in fee-simple, as far as disposing power is concerned. But his power, as we shall now see, is attended with certain limitations. For where there is in existence any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate-tail, and created by the same settlement as created the entail, the consent of the owner of such prior estate, or the first of such owners, if more than one, is made necessary to enable the tenant-in-tail (unless he be entitled to the immediate reversion expectant upon his own estate-tail) to make a complete disposition of the fee. Without such consent he can but bar his own estate-tail, converting it into a base-fee, and cannot bar those in remainder. The person whose consent is thus made requisite is called by the Act, the protector of the settlement, and he is endowed with the most absolute discretion as to giving or refusing his consent.[s] He is not bound by any agreement which he may have entered into, to withhold his consent, nor is his office to be treated as a trust, so that no Court of Equity can control or interfere with him, whether to restrain or compel his consent. Under the old system of recoveries, a check similar to that which is now secured by the office of protector, arose from the

[r] 'Reversions in the Crown, which come within the provisions of stat 34 and 35 Hen. VIII., or other restraining Acts, are excepted by sec. 18.' See *ante*, p. 115.

[s] 'When a married woman occupies the place of protector, she and her husband together are deemed protector (s. 24). A doweress, or a bare trustee, is not to be protector (s. 27). But under settlements made previous to Dec. 31, 1833, the person who, but for the operation of the Act, would have been the proper person to make the tenant to the writ of entry, is to be the protector; and a settlor may appoint any number of persons *in esse*, not exceeding three, to be protectors of the settlement in lieu of the person who would otherwise have been so.'

necessity of obtaining the concurrence of the person entitled to the immediate freehold, prior to the estate-tail, in order to make a tenant to the *præcipe* or writ of entry: this was found to operate in restraint of imprudent alienation, and to favor the retention of estates in one family, through a succession of generations. The new plan has this advantage over the old. The owner of the prior estate is now only a *consenting*, not a *conveying* party; he may therefore concur in barring the entail, without affecting the powers or interests incident to his own estate, and without letting in the incumbrances of the remainder-man, which in some cases was a consequence of the old system.'

'Having imparted a general disposing power, under such conditions as we have seen, to the tenant-in-tail, the statute next enacts that the disposition shall be effected by some one of the assurances (not being a will) by which the same disposition might have been made if the tenant-in-tail had been made tenant in fee-simple.[t] But such disposition (except the land be of copyhold tenure) must be made or evidenced by deed, and no disposition resting merely in contract, notwithstanding it be evidenced by deed, shall be good under the Act, either at law or in equity. In this respect, therefore, as under the old law, the heir-in-tail and remainder-man are more favoured than the heir-at-law of tenant in fee-simple, whom the ancestor's contract binds, and whom he may bar by his will.'

'No assurance will have any operation under the Act (except a lease at rack-rent for less than twenty-one years), unless enrolled in Chancery within six calendar months after its execution. The consent of the protector may be given by the same deed, or by a separate deed, provided it be executed on or before the day when the disentailing deed is executed, and this separate consenting deed must be likewise enrolled at or before the time when the other deed is enrolled. A tenant-in-tail of lands held by copy of court roll, if his estate be a legal one, and not merely an estate in equity, must dispose of his lands by surrender in the usual way. If, however, his estate be but an equitable one, he may dispose of it either by surrender or by deed; and if by deed, such deed must be

[t] 'If the tenant-in-tail making the disposition be a married woman, the concurrence of her husband is necessary to give effect thereto.'

entered on the Court Rolls, as must also the deed by which the protector (if there be one) consents to the disposition. But if the disposition be made by surrender, the protector may give his consent to the person taking the surrender. The statute further enables the Commissioners of Bankruptcy to dispose by deed of the lands of a bankrupt tenant-in-tail, to as large an extent as the bankrupt himself might have done.'

Conveyances by feme-covertes.

'One of the purposes to which fines were formerly applied was, to pass the estates and interests of married women, which could not, on account of the incapacity arising from coverture, have been otherwise effectually bound. The Act therefore provides that it shall be lawful for every married woman (in every case, except that of being tenant-in-tail, which is otherwise provided for by the Act, as we have already seen), by deed to dispose of lands of any tenure and money subject to be invested in the purchase of lands, and to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right may have in any such lands or money, and to release and extinguish any power which she may have over such lands or money, as effectually as though she was a feme sole. But her husband must concur in the deed, which must also be produced and acknowledged by her before a judge of one of the superior courts of Westminster, or a county-court judge,[u] or before one of the Commissioners appointed by the Lord Chief Justice of the Common Pleas, for the purpose of taking such acknowledgments. On this occasion she is examined, apart from her husband, as to her knowledge of the deed, and whether she voluntarily and freely consents to it, a ceremony which, as we have previously seen, was used when a married woman was cognizor in a fine. If the disposition intended to be made be of lands of copyhold tenure to which the married woman is entitled for an estate at law, it must be done by way of surrender into the hands of the lord; an equitable estate in copyhold may be disposed of in the same way or by deed. Whenever it is done by surrender, the married woman is to be separately examined by the person taking the surrender as to the voluntary nature of the act.'

[u] 19 & 20 Vict. c. 108, s. 73.

'Such are briefly the provisions of this important statute, by which estates-tail may now be absolutely alienated or barred and converted into estates in fee, and by which the interests of married women may be passed. That which was formerly effected by a series of tedious forms, with perpetual danger of errors or omissions, which might vitiate the whole transaction, is now accomplished by a simple deed, the same in form as that by which any other owner might convey his interest, or in cases of copyhold tenure, by surrender; the only additional requisites being that these acts be done with the consent of certain proper parties, who are clearly defined, that the deed be enrolled, and in the case of a married woman, that it be acknowledged by her in the manner prescribed by the Act.'

5. Vesting orders, &c.

5. 'The last kind of assurances which may properly be classed among those by *matter of record*, are the orders of the Court of Chancery, and of commissioners acting under the powers given by divers modern Acts of Parliament, by virtue of which orders, property may be taken from one individual and vested in another, without any of the ordinary methods of conveyance. Such are the vesting orders made by the Court of Chancery under the recent Trustee Acts.[v] Under the earlier Acts, having for their object the removal of the difficulties arising from the incapacity of infant or lunatic trustees to deal with the estates vested in them, it was usual for the court to direct some person to convey in their stead; but under the recent Acts it is empowered to make orders, the effect of which is that the estate becomes immediately vested in the substituted trustees as effectually as if a conveyance or assignment had been duly made by the person previously entitled to the legal estate.'

'The same principle has been applied in the recent legislation upon bankruptcy and insolvency; and where formerly a conveyance of the real estate of the bankrupt or insolvent from the commissioners to the assignees was necessary, the estate (with the exception of copyhold lands) now vests in the assignees by virtue of their appointment only.'

'The awards of the Inclosure Commissioners, commutations

[v] 13 & 14 Vic. c. 60, 15 & 16 Vic. c. 55.

of tithes by the Tithe Commissioners, or of manorial rights by the Copyhold Commissioners, and the various proceedings by which the rights and claims of parties in respect of lands are transferred, confirmed or evidenced under the authority and seal of these several commissions (which have now been consolidated into one by 14 & 15 Vict. c. 53) may be classed among assurances by matter of record. The arrangements thus made do not depend solely on the act and consent of the parties themselves, but must be sanctioned and ratified by the Commissioners, documents sealed with whose common seal are receivable in evidence without farther proof, and are also conclusive as to every formality, required for their validity, having been duly observed.'

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This, therefore, is a very narrow title; being confined to copyhold lands, and such customary estates as are holden in ancient demesne, or in manors of a similar nature; which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his seigniory, it is therefore a forfeiture of a copyhold.[a] Nor are they transferable by matter of record, even in the superior courts; but only in the court-baron of the lord. The method of doing this is generally by *surrender;* though in some manors, by special custom, recoveries 'might formerly have been' suffered of copyholds;[b] but these differing in nothing material from recoveries of free land, save only that they were not suffered in the 'Court of Common Pleas,' but in the court-baron of the manor, I shall confine myself to conveyances by surrender, and their consequences. [365]

Surrender, *sursumredditio,* is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and behoof of A. and his heirs; to the use of his own will; and the like. The process, in most manors, is that the tenant comes to the steward, either in court, or out of court, or else to two customary tenants of the same manor, provided there be a custom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to [366] Surrender.

[a] Litt. § 74.

[b] Moor. 637. 'The stat. 3 & 4 Will. IV. c. 74, also abolished these customary recoveries.'

the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender, in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestui que use* (who is sometimes, though rather improperly, called the surrenderee), to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

Regrant.

Admittance.

In this brief abstract of the manner of transferring copyhold estates, we may plainly trace the visible footsteps of the feudal institutions. The fief, being of a base nature and tenure, is inalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands; for the alienee of a copyhold had merely *jus fiduciarium*, for which there was no remedy at law, but only by *subpœna* in Chancery.[c] When, therefore, the lord had accepted a surrender of his tenant's interest, upon confidence to regrant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the Chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV.,[d] was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use*

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[c] Cro. Jac. 568.

[d] Bro. Abr. tit. *Tenant per copie*, 10.

of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the licence of alienation. *Add to this the plain feudal investiture, by delivering the symbol of seisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quae saltem coram duobus vasallis solemniter fieri debet:*"[e] and, to crown the whole, the oath of fealty is annexed, the very bond of feudal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

Surrender essential to conveyance of copyholds.

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly;[f] and formerly, if a man would devise a copyhold, he must have surrendered it to the use of his last will and testament; and in his will he must have declared his intentions, and named a devisee, who would then be entitled to admission. 'But the wills of persons dying after the 12th July, 1815, are by statute 55 Geo. III. c. 192, as effectual without a previous surrender as they would have been with one; and by the Wills Act, 1 Vict. c. 26, all copyhold lands are made devisable, whether there is or is not a custom to that effect.' [368]

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

[e] Feud. l. 2, t. 2.

[f] But an exchange of copyhold lands may now be effected in the same way as an exchange of freeholds, under the authority of the Inclosure Commissioners. 8 & 9 Vict c. 118. See *ante*, p. 320.

1. Surrender.

1. A surrender, by an admittance, subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestui que use*, the lord takes notice of the surrenderor as his tenant: and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo;* for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender.[g] 'And yet the legal interest is not in the *cestui que use*, for' if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed. For, though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio:* because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which [369] was *ab initio* void. Yet, though upon the original surrender the nominee has but a possibility, it is however such a possibility as may, whenever he pleases, be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the surrender; but, if the lord refuse to admit him, he is compellable to do it by a bill in Chancery, or a *mandamus:*[h] and the surrenderor can in nowise defeat his grant; his hands being for ever bound from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act.[i]

2. Presentment.

2. As to the *presentment;* that, by the *general* custom of

[g] It was at one time thought that no legal interest was vested in the nominee before admittance, and that if he entered he was a trespasser, and punishable in an action of trespass. (Bl. Com. v. iii. p. 368.) But the surrenderee would not now be considered a trespasser; for it has been determined that he may recover in an ejectment against the surrenderor, claiming title of a date after the surrender, where there was an admittance of such party before trial: but as the surrenderor after the surrender is considered merely a trustee for the nominee, it should seem that the decision would have been the same even if the subsequent admittance had not been proved. (1 T. R. 600; 5 Burr. 2764; 16 East, 208.)—[CHRISTIAN.]

[h] 2 Roll. Rep. 107.

[i] Co. Copyh. § 39.

manors, was formerly to be made at the next court-baron immediately after the surrender; but by *special* custom in some places it was good, though made at the second or other subsequent court. And it was to be brought into court by the *same* persons that took the surrender, and then to be presented by the homage; and in all points material was required to correspond with the true tenor of the surrender itself. And therefore, if the surrender were conditional, and the presentment absolute, both the surrender, presentment, and admittance thereupon, were wholly void: the surrender, as having never been truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment. If a man surrendered out of court, and died before presentment, and presentment were made after his death, according to the custom, this was sufficient. So too, if *cestui que use* died before presentment, yet, upon presentment made after his death, his heir according to the custom was admitted. The same law prevailed, if those into whose hands the surrender was made, died before presentment; for, upon sufficient proof in court that such a surrender was made, the lord was compellable to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender was made, refused or neglected to bring it in to be presented, upon a petition preferred to the lord in his court-baron, the party grieved might there find remedy. But if the lord would not do him right and justice, he might sue both the lord and them that took the surrender in Chancery, and there find relief. [370]

'But now by the statute 4 & 5 Vict. c. 35, every surrender and deed of surrender which the lord shall be compellable to accept or shall accept, and every will and codicil, a copy of which shall be delivered to the lord, his steward or deputy steward, out of court, or at a court in the absence of the homage, shall be entered in the court rolls by such lord, steward or deputy, and such entry shall be of equal effect with an entry made in pursuance of a presentment; and presentment of the surrender, will, or other matter on which an admittance is founded, shall not be essential to the validity of the admittance. The statute also declares the ceremony of presentment to be not essential to the validity of an admittance, and further enacts that admittance may be

made at any time or place without holding any court for the purpose.'

3. Admittance.

3. Admittance is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and, thirdly, an admittance upon a descent from the ancestor.

Upon grant.

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may be well reputed their absolute owner and lord; yet if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects;[j] nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord.[k]

Upon surrender.

In admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument; and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender.[l]

Upon descent.

And, as in admittances upon surrenders, so in admittances *upon descents* by the death of the ancestor, the lord is used as

[j] Co. Copyh. § 41; *Doe* d. *Rayer* v. *Allard*, 2 Q. B. 792.

[k] 8 Rep. 63.

[l] 4 Rep. 27; Co. Litt. 59.

a mere instrument; and, as no manner of interest passes into [371] him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For, whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial acts, which every lord in possession is bound to perform.[m]

Admittances, however, upon surrender, differ from admittances upon descent in this, that by surrender nothing is vested in *cestui que use*, before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor; not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law takes notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground;[n] nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence indeed an observation might arise, that if the benefit which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to [372] his copyhold in court; and so the lord may be defrauded of his fine. But to this we may reply in the words of Sir Edward Coke,[o] "I assure myself, if it were in the election of the heir to be admitted or not to be admitted, he would be best contented without admittance; but the custom in every manor

[m] 4 Rep. 27; 1 Rep. 140. [n] 4 Rep. 23. [o] Copyh. § 41.

is in this point compulsory. For, either upon pain of forfeiture of their copyhold, or of incurring some great penalty, the heirs of copyholders are inforced, in every manor, to come into court and be admitted according to the custom within a short time after notice given of their ancestor's decease."

CHAPTER XXIII.

OF ALIENATION BY DEVISE.

THE last method of conveying real property is by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the origin and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded. [373]

It seems sufficiently clear that, before the conquest, lands were devisable by will.[a] But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord. And some have questioned whether this restraint (which we may trace even from the ancient Germans[b]) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens, that the same man is heir to many others, though by art and management he may [374] frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations; which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But when Solon[c] made a slight alteration, by permitting them (though only on failure of

[a] Wright, of Tenures, 172.
[b] Tacit. de Mor. Germ. c. 21.
[c] Plutarch. in vitâ Solon.

issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others; which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequence of free agency, when coupled with human infirmity), to debar the owner of lands from distributing them after his death as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament;[d] except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence

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subsisted.[e] And though the feudal restraint on alienation by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious.[f] Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to

[d] 2 Inst. 7.

[e] Litt. § 167; 1 Inst. 111. Cro. Car. 561; Robins. on Gavelk. b. 2, c. 5.

[f] Glanv. l. 7, c. 1.

be devised very frequently,[g] and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert,[h] that, as the popish clergy then generally sat in the Court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses[i] had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz., 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted, that all persons being seised in fee-simple (except feme-coverts, infants, idiots, and persons of nonsane memory) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which, on the alteration of tenures by the statute of Charles the Second, amounted to the whole of their landed property, except their copyhold tenements.

Statute of wills, 32 Hen. VIII. c. 1, 34 Hen. VIII. c. 5.

Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain; but by construction of the statute 43 Eliz. c. 4, it was held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges formerly carried them great lengths in supporting such charitable uses;[j] it being held that the statute of Elizabeth, which favours appointments to charities, supersedes and repeals all former statutes,[k] and supplies all defects of assurances:[l] and therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrendering to the use of his will,[m] and a devise (nay even a settlement) by tenant-in-tail, without either fine or recovery, if made to a charitable use, have in former times been held good by way of appointment.[n]

Devises to charitable uses.

[g] Plowd. 414.
[h] On Devises, 7.
[i] 27 Hen. VIII. c. 10. See Dyer, 143.
[j] Ch. Prec. 272.
[k] Gilb. Rep. 45; 1 P. Wms. 248.
[l] Duke's Charit. Uses, 84.
[m] Moor. 890.
[n] 2 Vern. 453; Ch. Prec. 16.

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute.[o] To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3, directed, that all devises of lands and tenements should not only be in writing, but be signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses; 'a number which by the Wills Act, 1 Vict. c. 26, has been reduced to two.' A similar solemnity is requisite for revoking a devise; though the same may be also revoked by the burning, tearing, or destroying thereof by the devisor by his direction, or in his presence and with the intention on his part to effect such revocation; as likewise by the marriage of the testator.[p]

Statute of frauds.

In the construction of the statute,[p] it was adjudged that the testator's name, written with his own hand, at the beginning of his will, as, "I John Mills do make this my last will and testament," was a sufficient signing, without any name at the bottom; though the other were the safer way. It was also determined, that though the witnesses must all have seen the testator sign, or at least acknowledge the signing, yet they might do it at different times. But they must all have subscribed their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument. 'But now by the statute 1 Vict. c. 26, the testator's signature must be at the *foot or end* of the will, and must be made by him or by some other person by his direction in his presence, and such signature must be made or acknowledged by him in the

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[o] Dyer, 72; Cro. Eliz. 100.

[p] 'Formerly, marriage and the birth of a child was considered a sufficient ground for implying the revocation of a will. The stat. 1 Vic. c. 26, s. 19, expressly provides that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances, but makes marriage an absolute revocation.'

presence of two witnesses, present at the same time, and they must attest and subscribe in the presence of the testator. But no particular form of alteration is necessary.'[q]

Competency of witnesses to a will.

'Many questions were raised under the old law, as to the *competency* of the witnesses to a will.' In one case, determined by the Court of King's Bench,[r] the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if,

[q] 'Several questions have arisen on the meaning of the words *foot* or *end* of the will, and it has been thought necessary to pass an act (15 Vict. c. 24) to define, as far as may be, the meaning of these words. This statute enacts that the signature of the testator shall be deemed valid, if the same shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance, that the signature shall not follow or not be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature. Each of the circumstances enumerated has reference to some actual case in which the ecclesiastical courts had found a difficulty in interpreting the simple words *foot* or *end*.'

[r] Stra. 1253.

in such case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such [379] creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will should be contested. And in a much later case[s] the testimony of three witnesses who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

'The statute 1 Vict. c. 26 repeals the act 25 Geo. II. c. 6 (except as it affects the colonies), and re-enacts and extends some of its provisions. It makes void devises and bequests not only to an attesting witness, but to the husband or wife of such witness, and expressly provides that the incompetency of a witness to be admitted to prove the execution of a will, shall not render it invalid. The statute further enacts that any *creditor*, or the wife or husband of any creditor, whose debt is charged upon the property devised or bequeathed by the will, may be admitted to prove the execution thereof as an attesting witness, and that an *executor* of a will may be admitted to prove its execution, a point on which some doubts had previously existed.'

Another inconvenience was found to attend this method of conveyance by devise; in that creditors by bond and other specialties which affected the *heir*, provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14, provided, that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, should (as against such creditors only)

[s] *Windham* v. *Chetwynd*, 1 Burr. 430.

be deemed to be fraudulent and void: and that such creditors might maintain their actions jointly against both the heir and the devisee. 'This statute has been repealed, but the payment of simple contract, as well as specialty debts, out of the real estate of the deceased debtor, has been provided for by other statutes.'[t]

A will of lands, made by the permission and under the control of these statutes, was considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land should be subject; with this difference, that in other conveyances the actual *subscription* of the witnesses was not required by law, though it was prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead: but in devises of lands such subscription was absolutely necessary, by statute, in order to identify a conveyance which in its nature could never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands was merely a species of conveyance, was founded the distinction 'which formerly prevailed' between such devises and testaments of personal chattels; the latter operating upon whatever the testator died possessed of, the former only upon such real estates as were his at the time of executing and publishing his will; and therefore no after-purchased lands would pass under such devise, unless, subsequent to the purchase or contract, the devisor republished his will.[u] 'But the statute 1 Vict. c. 26, has abolished this distinction, and all property of whatever kind, of or to which a man is possessed or entitled, *at the time of his death*, passes by his will; as the instru-

[t] See 11 Geo. IV. and 1 Will. IV. c. 47; 3 & 4 Will. IV. c. 104; and 2 & 3 Vict. c. 60.

[u] Also if an estate were given to A. and his heirs, or to A. and the heirs of his body, or any interest whatever to A., and A. died before the testator, the devise lapsed, and the heirs of A. could claim no benefit from the devise. A father devised his estate to his eldest son and the heirs of his body, and upon failure of his issue to his second son in like manner in tail; the eldest son died before the father, leaving several children; and the father, supposing that the eldest of them would take under the devise, made no alteration in his will: the consequence was, that the devise lapsed, and the second son was entitled by the will to an estate-tail, in exclusion of the children of the eldest brother, the first objects of the father's bounty and regard. The Court of King's Bench in Ireland decided in favour of the grandson; but that decision was reversed by the King's Bench and House of Lords here, the question being too clear to admit a doubt. (6 T. R. 518; 1 Bro. 219; Doug. 330.)—[CHRISTIAN.]

ment now, with reference to the real and personal estate comprised in it, speaks and takes effect as if executed immediately before the testator's death, unless a contrary intention appears by the document itself.'

We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice for the construction and exposition of them all. These are,

1. Construction of deeds.

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit.[v] For the maxims of law are, that, "*verba intentioni debent inservire;*" and "*benigne interpretamur chartas propter simplicitatem laicorum.*" And therefore the construction must also be *reasonable*, and agreeable to common understanding.[w]

2. Literal construction.

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est:*[x] but that where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words; nam qui haeret in literâ, haeret in cortice.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso.*[y] And another maxim of law is, that "*mala grammatica non vitiat chartam;*" neither false English nor bad Latin will destroy a deed.[z] Which, perhaps, a classical critic may think to be no unnecessary caution.

3. Construction of entirety.

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3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. "*Nam ex antecedentibus et consequentibus fit optima interpretatio.*"[a] And therefore that every part of it be (if possible) made to take effect, and no word but what may operate in some shape or other.[b] "*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat.*"[c]

[v] And. 60.
[w] 1 Bulstr. 175; Hob. 304.
[x] 2 Saund. 157.
[y] Hob. 27.
[z] 10 Rep. 133; Co. Litt. 223.
[a] 1 Bulstr. 101.
[b] 1 P. Wms. 457.
[c] Plowd. 156.

4. Most strongly against grantor.

4. That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee.[d] For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them.[e] And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail.[f]

5. Sense agreeable to law preferred.

5. That, if the words will bear two senses, one agreeable to, and another against, law, that sense be preferred which is most agreeable thereto.[g] As if tenant-in-tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law, and not for the life of the lessee, which is beyond his power to grant.

6. Repugnant clauses.

6. That, in a deed, if there be two clauses, so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected;[h] wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand.[i] Which is owing to the different natures of the two instruments; for the first deed and the last

[d] Co. Litt. 42.

[e] According to Sir William Blackstone, a distinction must be taken here between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are (he says) to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party has given his consent to every one of them. But, in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. (Co. Litt. 42; Plowd. 134 a.) 'But this distinction does not appear to be recognized at the present day, and the rule of construing most strictly against the grantor has frequently been applied to indentures.' (1 M. & W. 556. 5 B. & Cr. 842.)

[f] Bacon's Elem. c. 3.

[g] Co. Litt. 42.

[h] Hardr. 94.

[i] Co. Litt. 112.

will are always most available in law. Yet in both cases we should rather attempt to reconcile them.[j]

7. That a devise be most favourably expounded to pursue if possible the will of the devisor, who, for want of advice or learning, may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance; and an estate-tail without words of procreation.[k] By

[j] Cro. Eliz. 420; 1 Vern. 30. Such was held to be the law in the time of Lord Coke; but now, where the same estate is devised to A. in fee, and afterwards to B. in fee in the same will, they are construed to take the estate as joint-tenants, or tenants in common, according to the limitations of the estates and interests devised. (3 Atk. 493; Harg. Co. Litt. 112 b. n. 1.) – [CHRISTIAN.]

[k] In the celebrated case of *Perrin* v. *Blake* (Burr. 2579), the question was, whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction which would have clearly been put upon the same words if they had been used in a deed. The devise in substance was as follows: the testator declared, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his own life; and *to that intent* I give my son John Williams my estate during his natural life, remainder to my brother-in-law during the life of my son John Williams (the design of that being to support the contingent remainder); remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the Court of King's Bench determined, that John Williams took an estate for life only; but upon a writ of error to the Exchequer-chamber, the decision was reversed, and six out of eight of the other judges held, that John Williams took an estate-tail, which of consequence gave him an absolute power of *selling or disposing of* the estate as he pleased. The discussion of this subject called forth a splendid display of legal learning and ingenuity. Yet it has since been observed by a learned judge, that as one of the judges held that John Williams took an estate-tail, because he was of opinion that such might be presumed to be the testator's intention, no argument in future can be drawn from this case; because one-half of the judges relied upon the ground of intention alone. And the editor entirely concurs with that learned judge, that it is the first and great rule in the exposition of wills, and to which all other rules must bend, that the intention of the testator, expressed in his will, shall prevail, provided it be *consistent with the rules of law;* that is, provided it can be effectuated consistently with the limits and bounds which the law prescribes. To argue that the intention shall be frustrated by a *rule of construction of certain words*, is to say that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind.

Where technical phrases and terms of art are used alone by a testator, it is fair to presume that he knew their artificial import and signification, and that such was his will and intention; but where he happens to introduce them, and at the same time in effect declares that I do not intend what conveyancers understand by these words, but my intention is to dispose of my estate directly contrary to the construction generally put upon them,

a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man devises lands to his heir-at-law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication;[l] for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So, also, where a devise is of Black-acre to A. and of White-acre to B. in tail, and if they both die without issue, then to C. in fee; here A. and B. have *cross-remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C.'s remainder over shall be postponed till the issue of both shall fail.[m] 'Formerly' such cross-remainders were not allowed between more than two devisees:[n] but this rule no longer exists. When cross-remainders are to be raised between two and no more, the favourable presumption is in support of cross-remainders; the contrary is the case when between more than two, but in either case the intention of the testator, clearly appearing, may defeat the presumption.'[o] And, in general, where any implications are allowed, they must be such as are *necessary* (or at least [382] highly *probable*) and not merely *possible* implications.[p] And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses,[q] is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

And thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which

surely courts of justice are, or ought to be, as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if he had expressed it in the most apt and appropriate language. (1 Bl. Rep. 672; 4 Burr. 2579; Doug. 329; Fearne, 113; Harg. Tracts, 351, 490.) —[CHRISTIAN.]

[l] H. 13 Hen. VII. 17; 1 Ventr 376.

[m] Freem. 484.

[n] Cro. Jac. 655; 1 Ventr. 224; 2 Show. 139.

[o] *Atherton* v. *Pye*, 4 T. R. 710; *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234.

[p] Vaugh. 262.

[q] Fitzg. 236; 11 Mod. 153.

they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them; we have examined the *tenures*, both ancient and modern, whereby those estates have been, and are now, holden; and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind;* and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws that differs much from every other system, except those of the same feudal origin, in its notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

The subject which has thus employed our attention is of very extensive use, and of as extensive variety. And yet I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the Conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or [383] method; and the multiplicity of Acts of Parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It has been my endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers as were before strangers even to the very terms of art, which I have been obliged to make use of; though, whenever those have first occurred, I have generally attempted a short explanation of their meaning. These are indeed the more numerous, on account of the different languages which our law has at different periods been taught to speak, the difficulty arising from which will insensibly diminish by use

and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke:[r] "Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place" (or perhaps on a second perusal of the same) "his doubts will be probably removed."

[r] Proeme to 1 Inst.

CHAPTER XXIV.

OF THINGS PERSONAL.

[384] UNDER the name of things *personal* are included all sorts of things *moveable*, which may attend a man's person wherever he goes; and, therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immoveable*, as, lands and houses, and the profits issuing thereout. These, being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it, indeed, was comparatively very trifling during the scarcity of money and the ignorance of luxurious refinements which prevailed in the feudal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence, likewise, may be derived the frequent [385] forfeitures, inflicted by the common law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the Mirror that can fairly be referred to this head; and the little that is

to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians.. But, of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appear to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

Chattels.

But things personal, by our law, do not only include things *moveable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which, Sir Edward Coke says,[a] is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla;* which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all moveables in general.[b] In the *Grand Coustumier* of Normandy,[c] a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that, not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehensive to take in everything that the law considers as a chattel interest. For since, as the commentator on the *Coustumier*[d] observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* estate: the consequence of which, in both laws is, that it must be a personal estate, or chattel.

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[a] 1 Inst. 118.
[b] Dufresne, II. 409.
[c] C. 87.
[d] *Il conviendroit quil fust non mouuable et de duree a tousiours.* Fol. 107, a.

Chattels, therefore, are distributed by the law into two kinds, chattels *real*, and chattels *personal*.[e]

1. Chattels real.

1. Chattels *real*, says Sir Edward Coke,[f] are such as concern, or savour of, the realty; as terms for years of land, wardship in chivalry (while the military tenures subsisted), the next presentation to a church, estates by statute-merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, viz., immobility, which denominates them *real;* but want the other, viz., a sufficient, legal indeterminate duration: and this want it is that constitutes them *chattels*. The utmost period for which they can last, is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feudal principles as merely bailiffs or farmers; and the tenant of the freehold, as we have already seen, might at any time have destroyed their interest, till the reign of Henry VIII. A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, 'could, at common law, only be' [387] conveyed by corporal investiture and livery of seisin; which seemed to give the tenant so strong a hold of the land, that it never after could be wrested from him during his life, but by his own act of voluntary transfer or of forfeiture; or else by the happening of some future contingency; as, in estates *pur auter vie*, and the determinable freeholds mentioned in a former chapter. And even these, being of an uncertain duration, may, by possibility, last for the owner's life: for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life estate; and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans

[e] So too in the Norman law, *Cateux sont meubles et immeubles; si comme vrais meubles sont qui transporter se peuvent, et ensuivir le corps; immeubles sont choses qui ne peuvent ensuivir le corps, ni estre transportees, et tout ce qui n'est point en heritage.* LL. Will. Nothi, c. 4, apud Dufresne, II. 409.

[f] 1 Inst. 118.

put in opposition to fief, and we to freehold, was not conveyed by any seisin or corporal investiture, but the possession was gained by the mere entry of the tenant himself; and such an interest will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired, of course, the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. Chattels personal.

2. Chattels *personal* are, properly and strictly speaking, things *moveable;* which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were employed upon real estates: that kind of property being of a mongrel, amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

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Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property,* or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in its order.

CHAPTER XXV.

OF PROPERTY IN THINGS PERSONAL.

[389] PROPERTY, in chattels personal, may be either in *possession;* which is where a man has not only the right to enjoy, but has the actual enjoyment of, the thing: or else it is in *action;* where a man has only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession,* is divided into two sorts, an *absolute* and a *qualified* property.

I. Possession absolute.

I. First, then, of property in *possession absolute;* which is where a man has, solely and exclusively, the right, and also the occupation, of any moveable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these, therefore, there remains little to be said.

Inanimate things.

Animals.

But with regard to *animals,* which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to [390] another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitæ,* and such as are *feræ naturæ:* some being of a *tame* and others of a *wild* disposition. In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute a property as in any

inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property:[a] in which our law agrees with the laws of France and Holland.[b] The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry.[c] But in animals *feræ naturæ* a man can have no absolute property.

Property in the young of tame animals.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore, in the laws of England, as well as Rome,[d] "*si equam meam equus tuus prægnantem facerit non est tuum sed meum quod natum est.*" And for this Puffendorff[e] gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care: wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them.[f] But here the reasons of the general rule cease, and "*cessante ratione* [391] *cessat et ipsa lex:*" for the male is well known, by his constant association with the female; and for the same reason the owner of the one does not suffer more disadvantage during the time of pregnancy and nurture, than the owner of the other.

II. Qualified property.

II. Other animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited,* or *special* property: which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place show, how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature; and then, how it

[a] 2 Mod. 319.
[b] Vin. in Inst. l. 2, tit. 1, § 15.
[c] 1 Hal. P. C. 511, 512.
[d] Ff. 6, 1, 5.
[e] L. of N. l. 4, c. 7.
[f] 7 Rep. 17.

may subsist in any other things, when under particular circumstances.

Animals feræ naturæ.

First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *feræ naturæ*, either *per industriam*, *propter impotentiam*, or *propter privilegium.*

1. Qualified property per industriam.

1. A qualified property may subsist in animals *feræ naturæ*, *per industriam hominis:* by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity; and are therefore, say they, called *mansueta, quasi manui assueta.* But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it [392] calls *domitæ naturæ:* and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning.[g] A maxim which is borrowed from the civil law;[h] "*revertendi animum videntur desinere habere tunc,* "*cum revertendi consuetudinem deseruerint.*" The law therefore

[g] Bracton, l. 2, c. 1; 7 Rep. 17.

[h] Inst. 2, 1, 15.

extends this possession farther than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he has *animum revertendi.* So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them.[i] But if a deer, or any wild animal reclaimed, has a collar or other mark put upon him, and goes and returns at his pleasure; or, if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him;[j] but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *feræ naturæ;* but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law.[k] And to the same purpose, not to say in the same words with the civil law, speaks Bracton:[l] occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it has been also said,[m] that with us the only ownership in bees is *ratione soli;* and the charter of the forest,[n] which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

Bees.

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In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a pro-

[i] Finch. L. 177.
[j] Crompt. of Courts, 167; 7 Rep. 16.
[k] Puff. l. 4, c. 6, § 5; Inst. 2, 1, 14.
[l] L. 2, c. 1, § 3.
[m] Bro. Abr. tit. *Propertie*, 37.
[n] 9 Hen. III. c. 13.

perty, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony, by *common law*, to steal such of them as are fit for food, as it is to steal tame animals:[o] but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds;[p] because their value is not intrinsic, but depending only on the caprice of the owner;[q] though it is such an invasion of property as may [394] amount to a civil injury, and be redressed by a civil action.[r] Yet to steal a reclaimed hawk is felony by common law, and 'was so till lately by' statute;[s] a relic of the tyranny of our ancient sportsmen. 'And stealing any dog, bird, or other beast, not the subject of larceny at common law, and ordinarily kept in a state of confinement, is now, by statute 7 & 8 Geo. IV. c. 29, punishable with fine, and imprisonment for a second offence. By statute 8 & 9 Vict. c. 47, also, dog-stealing is a misdemeanor.' Among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture.[t] And thus much of qualified property in wild animals, reclaimed *per industriam.*

2. A qualified property may also subsist with relation to

[o] 1 Hal. P. C. 512.

[p] Lamb. Eiren. 275.

[q] 7 Rep. 18; 3 Inst. 109.

[r] Bro. Abr. tit. *Trespass*, 407.

[s] 1 Hal. P. C. 512; 1 Hawk. P. C. c. 33; 7 & 8 Geo. IV. c. 27.

[t] "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summâ caudâ suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudæ tritico co-operiatur.*" Wotton, LL. Wall. l. 3, c. 5, § 5. An amercement similar to which, Sir Edward Coke tells us (7 Rep. 18), there anciently was for stealing swans; only suspending them by the beak instead of the tail.

animals *feræ naturæ, ratione impotentiæ*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or rabbits or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires:[u] but, till then, it is in some cases trespass, and in others 'a misdemeanor (formerly a' felony) for a stranger to take them away.[v] For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot, through weakness, any more than the others through restraint, use their natural liberty and forsake him.

2. Qualified property, *propter impotentiam.*

3. A man may, lastly, have a qualified property in animals *feræ naturæ, propter privilegium:* that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty 'or on his land;'[w] and may restrain any stranger from taking them therein: but the instant they depart into another liberty 'or to another's land,' this qualified property ceases. The manner in which this privilege is acquired, will be shown in a subsequent chapter.

3. Qualified property, *propter privilegium.*

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The qualified property which we have hitherto considered, extends only to animals *feræ naturæ*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows, corrupts the air of his house or gardens, fouls his water, or unpens and lets it out, or if he

Other objects of qualified property.

[u] Carta de forest. 9 Hen. III. c. 13.
[v] 7 Rep. 17; Lamb. Eiren. 274; 6 Geo. IV. c. 69.
[w] 1 & 2 Will. IV. c. 32.

diverts an ancient water-course that used to run to the other's mill or meadow; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

Qualified property from temporary possession.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. [396] As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor has only the right, and not the immediate possession; the bailee has the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also. So, also, in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, &c.; and so too is that of the pledgee, which depends upon its non-performance. The same may be said of goods distrained for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distrainor, or party distrained upon; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. 'And the same observation applies to goods taken in execution by the sheriff, who has a sufficient property therein to be able to maintain an action for any injury thereto.'[x] But a servant, who has the care of his

[x] *Giles* v. *Grover*, 9 Bing. 128.

master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, has not any property or possession, either absolute or qualified, but only a mere charge or oversight.

Property in action.

Having thus considered the several divisions of property in *possession*, which subsists there only, where a man has both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in *action*, or such where a man has not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing, or *chose, in action*. Thus, money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action: for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases, the student will observe that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that, if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant.

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Ex contractu.

'Besides actions thus arising upon contracts express or implied, there is also another kind, those, namely, which arise from some wrong or injury done by one man to another, and which are therefore said to arise *ex delicto*. For any such injury the law awards a compensation to the party aggrieved. Thus for an assault on, or wrongful imprisonment of, the person, or for an injury by libel or slander to the reputation of another, the law awards such compensation as a jury shall estimate to be the damage sustained. So for a trespass on the lands, or for carrying away the goods of another, the wrongdoer must compensate the party injured, if he demand it in an action. To such compensation the party injured is entitled the instant he receives the injury; he has at once an

Ex delicto.

inchoate or incomplete right, but still a right; and such damages therefore constitute a thing to be recovered by suit, in other words a *chose in action*. The right to sue for such compensation arises, not from any previous contract by the wrongdoer that he should refrain from committing the injury complained of, but, in the cases above supposed, from an infringement by the wrongdoer of one of the inherent rights of every member of society, the right of personal liberty or the right of property. The action when brought is therefore said to be an action of *tort*.'

'The remedy by action *ex delicto* or of *tort* was, according to the rules of the old common law, confined to the lives of the parties injuring and injured, according to the maxim *actio personalis moritur cum persona*. But by statute 4 Edw. III. c. 7, the remedy which a man might have had by action for some injuries done to his *personal* estate, was extended to his executors after his death. And now the statute 3 & 4 Will. IV. c. 42, gives a right of action to the executors and administrators of a deceased person, for injuries done to his *real* estate within six months before his death. But the action must be brought within a year after his decease, and the damages, when recovered, form part of his personal estate. The statute 9 & 10 Vict. c. 93, also gives to the executors and administrators of a person who has met with his death by the wrongful act or default of another, an action against the wrongdoer, the damages in such case being distributed among the family of the deceased. The death of the wrongdoer formerly, as I have said, put an end to the remedy; but now, by statute 3 & 4 Will. IV. c. 42, an action is given against the executors and administrators of any person who has committed a wrong within six months before his decease. The action must be brought within six months after the executors or administrators have taken upon themselves administration; and the damages, when recovered, are payable in the like order of administration as simple contract debts.'

'There is one action founded upon tort, which is allowed by the common law, against the executors and administrators of the deceased wrongdoer. This is where the incumbent of an ecclesiastical benefice has allowed the house and buildings belonging thereto to become dilapidated. When the living becomes vacant by the death of the incumbent who has been

guilty of this neglect, his successor would be without remedy altogether, unless the executors or administrators of the deceased could be called to account.'

'There are thus two distinct sources of property in action, namely, injuries arising from the non-fulfilment of contracts expressed or implied, and injuries to one's person or property arising solely from an infringement of the natural or relative rights of the individual wronged. Of the nature of the former,' we shall discourse at large in a subsequent chapter. 'The latter will form the subject of our consideration in the third book of these Commentaries.'

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured, in case of non-performance, to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentiâ* than in *esse*: though the owner may have as absolute a property in, and be as well entitled to, such things in action, as to things in possession. 'Just as for all infringements of the natural or relative rights of another, the law gives redress by action against the wrongdoer by an action to recover the damage sustained. This redress, to which the party injured, as we have said, has an undoubted right, the instant the injury is sustained, and until recovered by verdict, constitutes a *chose in action*, precisely as do the damages sustained by a breach of contract.'

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And having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

1. Time of enjoyment.

First, as to the *time* of *enjoyment*. By the rules of the ancient common law, there could be no future property, to

take place in expectancy, created in personal goods and chattels; because being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed.[y] But yet in last wills and testaments, such limitations of personal goods and chattels in remainder, after a bequest for life, were permitted:[z] though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee;[a] the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded;[b] and therefore, if a man, either by deed or will, limits his books or furniture to A. for life, with remainder over to B., this remainder is good.[c] But where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation.[d] For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant-in-tail may acquire in a real estate.

'But practically, through the medium of trustees, personal property may be made to follow the same course of limitation as those which are made of real estate. The legal interest in the property being vested in trustees, equity requires them to fulfil the intentions of the testator. And by this means terms of years and personal chattels may be entailed as effectually as estates of inheritance, if it is not attempted to render them inalienable beyond the duration of lives in being and twenty-one years after, a limitation of time not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted by analogy to the case of freeholds of inheritance which cannot be so limited by way of remainder as to postpone a complete bar of the entail for a longer period of time.'[e]

[y] 1 Roll. Abr. 610.
[z] 1 Equ. Cas. Abr. 360
[a] Mar. 106.
[b] 2 Freem. 206.
[c] *Jolly* v. *Wills*, 2 Ch. Rep. 137.
[d] 1 P. Wms. 290.
[e] Harg. Notes, Co. Litt. 20 a, Note 5.

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Number of owners.

Next, as to the *number* of *owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in co-parcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute co-parceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants thereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements.[f] And, in like manner, if the jointure be severed, as, by either of them selling his share, the vendee and the remaining part owner shall be tenants in common, without any *jus accrescendi* or survivorship.[g] So, also, if 100*l*. be given by will to two or more, *equally to be divided* between them, this makes them tenants in common;[h] as we have formerly seen, the same words would have done in regard to real estates.

But the stock on a farm, though occupied jointly, and also the stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property, and there shall be no survivorship therein;[i] 'the maxim of the law being that *jus accrescendi inter mercatores locum non habet*. This is an exception to the ordinary rule of law, that where two or more persons are jointly possessed of property, the entire right to it, on the decease of any of them, shall remain to his survivors, and at length to the last survivor, who shall thus become entitled to the whole, by what is called the *jus accrescendi*. For in the case of partners of trade, "the wares or merchandises which they have as joint-tenants or partners, shall not survive, but shall go to the executors of him that deceaseth, and this *per legem mercatoriam*, which is part of the laws of this realm for the advancement and continuance of commerce and trade."[j] *Choses in action* are not, however, within the exception, and must therefore be sued for in the name of the survivor only;[k] but equity considers the surviving partner a trustee of the share of the deceased partner, to whose executors and administrators he must account for it.'[l]

[f] Litt. § 282; 1 Vern. 482.

[g] Litt. § 321.

[h] 1 Equ. Cas. Abr. 292.

[i] 1 Vern. 217; Co. Litt. 182.

[j] Co. Litt. 182 a; *Buckley* v. *Barker*, 6 Ex. 164.

[k] *Martin* v. *Crombie*, Ld. Raym. 34.

[l] *Lake* v. *Craddock*, 3 P. Wms. 188.

CHAPTER XXVI.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

[400] WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein; both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy 'or insolvency.' 11. By testament. 12. By administration.

I. Title by occupancy.

And, first, a property in goods and chattels may be acquired by *occupancy:* which we have more than once remarked, was the original and only primitive method of acquiring any property at all, but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations, have been introduced and countenanced, in order [401] to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the sovereign by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. Goods of alien enemy.

1. Thus, in the first place, it has been said, that anybody may seize to his own use such goods as belong to an alien enemy.[a] For such enemies, not being looked upon as members of our society, are not entitled, during their state of

[a] Finch. L. 178.

enmity, to the benefit or protection of the laws; and, therefore, every man that has opportunity, is permitted to seize upon their chattels, without being compelled, as in other cases, to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must, in reason and justice, be restrained to such captors as are authorized by the public authority of the state, residing in the crown;[b] and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And, therefore, it has been held, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. If an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner 'was considered to lose' his property therein, and it 'was' indefeasibly vested in the second taker, unless they were retaken the same day, and the owner before sunset put in his claim of property;[c] which was agreeable to the law of nations, as understood in the time of Grotius,[d] even with regard to captures made at sea, which were held to be the property of the captors after a possession of twenty-four hours. More modern authorities[e] require, that, before the property can be changed, the goods must have been brought into port, and have continued a night *intra præsidia*, in a place of safe custody, so that all hope of recovering them be lost. 'And now, in order to vest the property of a capture in the captors, a sentence of condemnation is, by the general practice of the law of nations and by the law of England, deemed necessary.[f] But still if, after the transfer of a prize to a neutral, a peace is concluded between the belligerents, the property is considered sufficiently changed to make the transfer valid, even though there was no legal condemnation.[g]

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'The law of England, as to the ships or goods of British subjects, has been modified by various enactments, introducing a policy not originally adopted by other countries, and differing from our own more ancient practice.[h] For British ships or goods taken at sea by an enemy, and afterwards retaken, at

[b] Freem. 40.
[c] Bro. Abr. tit. *Propertie*, 38.
[d] De J. B. & P. l. 3, c. 6, § 3.
[e] Bynkersh. Quæst. Jur. Publ. I. 4; Rocc. De Assecur. Not. 66.
[f] *Hamilton* v. *Mendes*, 2 Burr. 1209.
[g] The *Schoone Sophie*, 6 Rob. Adm. Rep. 138.
[h] The *Flad Oyen*, 1 Rob. Adm. Rep. 139.

any indefinite period of time, and whether before or after sentence of condemnation, are now to be restored to the original proprietors, on payment of salvage;[i] which, in the case of *King's* ships, is fixed at *one-eighth* of the beneficial interest in the whole recaptured property, and in the case of *private* ships, at *one-sixth* thereof.[j] The original owners are not entitled to any restitution when the vessels have been sent out by the enemy as ships of war; these when taken belong wholly to the recaptors.'[k]

And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war;[l] at least till his ransom be paid.[m] And this doctrine seems 'while negro-slavery existed,' to have been extended to negro-servants,[n] who were purchased, when captives of the nations with whom they were at war, and were, therefore, supposed to continue, in some degree, the property of their masters who bought them: though, accurately speaking, that property ought to consist rather in the perpetual *service*, than in the *body* or *person* of the captive.[o] 'Ransom of ships, goods, &c., it may be mentioned, is illegal, unless in the case of necessity, to be allowed by the Admiralty.'[p]

2 Goods found.

2. Thus again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen, are vested by law in the sovereign, and form a part of the ordinary revenue of the Crown.

3. Light, air, water, &c.

3. Thus, too, the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy.

[i] 29 Geo. II. c. 34; 6 Geo. IV. c. 49.

[j] 33 Geo. III. c. 66, s. 42.

[k] 43 Geo. III. c. 160, s. 39.

[l] Bro. Abr. tit. *Propertie*, 18.

[m] We meet with a curious writ of trespass in the register (102) for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud W. (in quâ idem A. quendam H. Scotum per ipsum A. de guerrâ captum tanquam prisonem suum, quousque sibi de centum libris, per quas idem H. redemptionem suam cum praefato A. pro vitâ suâ salvandâ fecerat satisfactum foret, detinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit abire permisit, &c.*"

[n] 2 Lev. 201.

[o] Carth. 396; Ld. Raym. 147; Salk. 667.

[p] 22 Geo. III. c. 25; 45 Geo. III. c. 72; *Webb* v. *Brook*, 3 Taunt. 6.

If I have an ancient window, overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall: for there the first occupancy is rather in him than in me. If my neighbour makes a tanyard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but, if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he has by the first occupancy acquired a property in the current.[q]

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4. Animals feræ naturæ.

4. With regard likewise to animals *feræ naturæ*, all mankind had by the original grant of the Creator, a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or, if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aërial, or aquatic animals as go under the denomination of *game;* the taking of which 'was formerly as we have seen' the exclusive right of the prince, and of such of his subjects to whom he had granted the same royal privilege. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the queen's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly.

5. Emblements.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn

[q] *Williams* v. *Morland*, 2 B. & C. 910; *Wood* v. *Waud*, 3 Exch. 748.

[404] growing on the ground, or other *emblements*, by any *possessor* of the land who has sown or planted it, whether he be owner of the inheritance, or of a less estate; which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills,[s] and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action;[t] and by the statute 11 George II. c. 10, though not by the common law,[u] they may be distrained for rent arrear. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given; and it was extended to tenants-in-fee, principally for the benefit of their creditors; and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distrainable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the grounds.[v]

6. By accession.

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement;[w] but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted.[x] And these doctrines are implicitly copied and adopted by our Bracton,[y] and have since been confirmed by many resolutions of the courts.[z] It has even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who pro-

[s] Perk. § 512.
[t] Bro. Abr. tit. *Emblements*, 21..
[u] 3 Inst. 109.
[v] 1 Roll. Abr. 666.
[w] Inst. 2, 1, 25, 26, 31; Ff. 6, 1, 5.
[x] Inst. 2, 1, 25, 34.
[y] L. 2, c. 2 & 3.
[z] Bro. Abr. tit. *Propertie*, 23. Moor. 20; Poph. 38; Year-books, 5 Hen. VII. fo. 15; 12 Hen. VIII. fo. 10.

vided them, being annexed to the person of the child or woman.[a]

7. Confusion of goods.

7. But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares.[b] But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost.[c] Our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent.[d]

8. Copyright.

8. There is another species of property, which, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Locke,[e] and many others, to be founded on the personal labour of the occupant. And this is the right which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an [406] invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions clothed in the same words, must necessarily be the same composition: and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the

[a] Moor. 214.
[b] Inst. 2, 1, 27, 28; 1 Vern. 217.
[c] Inst. 2, 1, 28.
[d] Poph. 38; 2 Bulstr. 325; 2 Vern. 516. There is no *confusion* where the goods can be distinguished. (*Colwill* v. *Reeves*, 2 Camp. 756.)
[e] On Gov. part 2, ch. 5.

author which is so exhibited; and no other man (it has been contended) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway: but, in case the author sells a single book, or totally grants the copyright, it has been supposed, in the one case, that the buyer has no more right to multiply copies of that book for sale, than he has to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand, it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that if one man wrote anything on the paper or parchment of another, the writing should belong to the owner of the blank materials:[f] meaning [407] thereby the mechanical operation of writing, for which it directed the scribe to receive a satisfaction; for in works of genius and invention, as in painting on another man's canvas, the same law[g] gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence,[h] Martial,[i] and Statius.[j] Neither with us in England has there been (till 'quite recently') any final determination upon the right of authors at the common law; 'which right the House of Lords has lately decided does not exist.'[k]

[f] *Si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris.* Inst. 2, 1, 33.

[g] Inst. 2. 1. 34.

[h] Prol. in Eunuch. 20.

[i] Epigr. i. 67, iv. 72, xiii. 3, xiv. 194.

[j] Juv. vii. 83.

[k] *Jeffreys* v. *Boosey*, 4 Ho. of Lords, c. 815.

Copyright by statute.

Whatever inherent copyright might 'formerly' have been supposed to subsist by the common law, the statute 8 Ann. c. 19 (amended by statute 15 Geo. III. c. 53), declared that the author and his assigns should have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer;* and also protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himself were living, the right should then return to him for another term of the same duration.

Copyright in books.

'But this Act is now repealed, and by several recent statutes the law of copyright has been placed upon a different footing. By the statute 5 & 6 Vict. c. 45, the protection of the law is extended to the period of *forty-two* years from the first publication of a work, or the period of the life of the author, and seven years following, whichever of these two terms may be the longer. And the copyright of a book published after the author's death, endures for *forty-two* years from the publication. With regard to encyclopædias, reviews, and periodicals, the Act provides that the copyright of articles supplied to such works, shall belong to the proprietors of the works for the same period as is given to the authors of books, whenever the article has been written on the terms that the copyright shall belong to the proprietor; but the copyright does not vest until payment has been actually made.'

'In the absence of any agreement, after twenty-eight years from the publication of an article, the right of publishing it in a separate form reverts to the author for the remainder of the term of forty-two years, given by the statute. During the twenty-eight years thus allowed to the publisher in the absence of an agreement, the consent of the author or his assigns must be obtained to enable the proprietor of the encyclopædia, review, or periodical, to publish the article in a separate form. The statute also reserves to the author of any dramatic piece or musical composition, and to his assigns the sole right of representation or performance in public, for the same term as is appointed for the duration of copyright in books. These rights extend to foreigners residing in this country. It has also been decided that a foreigner residing abroad is entitled to the copyright of a work composed by him which has been first published in this country.'[1]

[1] *Boosey* v. *Davidson*, 13 Q. B. 257; *Boosey* v. *Jeffreys*, 6 Ex. 580.

Register of copyrights.

'A public register of the proprietors of copyrights in printed works, and in manuscript dramatic and musical pieces, is directed to be kept at the Hall of the Stationers' Company in the City of London; and entry in this register, although not essential to the proprietor's title, is made a condition precedent to his right to sue for an infringement of his copyright. Assignments of copyrights may be made by entry upon the register, in a form prescribed by the Act, without being liable to stamp duty, and the effect is the same as though an assignment had been made by deed. All copyrights protected by the Act are also transmissible by bequest, and are deemed personal property, and in case of intestacy, are subject to the laws of distribution of personal estate. The importation of foreign reprints of works in which a British copyright exists, except by, or on behalf of the proprietor, is entirely prohibited.[m] But this prohibition may, by order in council, be removed as to British colonial possessions, provided the legislative authorities there make due provision for the protection of the rights of British authors in the colony.'[n]

'By the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, 17 Geo. III. c. 57, and 6 & 7 Will. IV. c. 59, copyright is given for the term of *twenty-eight* years in prints, engravings, maps, charts, and plans. It is required that the date of publication and the proprietor's name be engraved on the plate, and imprinted in each impression. These Acts have been held not to apply to wood illustrations printed on the same sheet as the letterpress, such engravings being part of the book, and comprised within its copyright.[o] The statute 15 and 16 Vict. c. 12, enacts that the provisions of the above-mentioned statutes are to be taken to include prints taken by lithography, or by any other process of indefinite multiplication.'

Copyright in sculpture, &c.

'Copyright has also been given by the statutes 38 Geo. III. c. 71, and 54 Geo. III. c. 56, to the makers of new and original sculpture, models, copies, and casts, for the term of *fourteen years* from the publication, and an additional term of *fourteen years* to the original maker, if then living. By the Designs Act, 1850 (13 & 14 Vict. c. 104), provision is made for the registration of such productions, and for the recovery of penalties in case of the piracy of works of this kind when properly registered.'

[m] 5 & 6 Vict. c. 45, s. 17, and 8 & 9 Vict. c. 93, s. 9.

[n] 10 & 11 Vict. c. 95.

[o] *Bogue* v. *Houlston*, 5 De G. & S. 267.

International copyright.

'In order to take advantage of any disposition which may be manifested by foreign nations to recognise British copyrights, powers are given by the Act 7 & 8 Vict. c. 12, to Her Majesty, by order in council, to grant the privilege of copyright in this country to the authors of books, prints, and works of art first published abroad. And the exclusive right of representation may in like manner be granted to the authors of dramatic or musical compositions. But such an order cannot be made until due protection for British copyrights has been secured by the government of the country, to the subjects of which the privilege of copyright in this country is conceded. Under this Act, a convention for the mutual protection of copyrights has been entered into with France, and its stipulations have been confirmed by the statute 15 & 16 Vict. c. 12. Authorized translations of foreign books and dramatic pieces are by this Act protected for a term not exceeding *five years* from the first publication or representation of such translation.'

Copyright in designs.

'By the statutes 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, copyright has been granted to designs for articles of manufacture for *nine months, a year, or three years,* according to the nature of the manufacture. All designs which it is desired to protect, are required to be registered, and for this purpose a registrar of designs is appointed. The copyright in such designs may be transferred by writing signed by the proprietor, or by an entry of the transfer in the register. The Designs Act, 1850, enables designs to be provisionally registered for the term of *one year,* and the Board of Trade is enabled, if it thinks proper, to extend the copyright for a term not exceeding three years.'

'Some of our early sovereigns assumed to themselves the right of granting to certain favoured subjects the monopoly, or sole right of selling and dealing in particular commodities. And this pretended prerogative was carried to a most injurious length in the reign of Queen Elizabeth, and led to the passing of the statute of monopolies, 21 Jac. I. c. 3; which, while declaring the illegality of such grants of exclusive trading in general, contained an exception in favour of new and original inventions in manufacture, and enacted that the declaration against monopolies should not extend to letters-patent and grants of privilege for the term of fourteen years or under, of

the sole working of any manner of new manufactures within the realm, to the true and first inventor thereof, provided such manufactures were not in use by others at the time of granting the letters-patent. Upon this exception, which, to a certain extent, recognises the royal prerogative, the modern law of patents for inventions in manufactures may be considered to rest. The Patent Law Amendment Act, 1852,[p] now regulates the terms upon which letters-patent may be granted. By this statute the fees which it was formerly necessary to pay upon obtaining a patent have been greatly reduced, and the payment of them is spread over the space of several years, so that if an invention be not found lucrative, the patent may be discontinued, and the fees saved. Letters-patent granted under this Act contain a condition that the same shall be void at the end of three years, unless a fee of 40*l.* with 10*l.* stamp duty be then paid, and again at the end of seven years from the grant, unless a fee of 80*l.* and 20*l.* stamp duty be paid.'

Extension of patents.

'The statute 5 & 6 Will. IV. c. 83,[q] authorised a prolongation of the original term, not exceeding seven years, to be given on the recommendation of the judicial committee of the Privy Council; and by statute 7 & 8 Vict. c. 69, a further term not exceeding fourteen years may be granted, if it be shown that the inventor has not been remunerated during the former period for the expense and labour incurred in perfecting his invention.'

'Under the statute of James I. it is requisite that the patent be granted to the true and first inventor. Accordingly, one who purchases a secret from an inventor cannot obtain letters-patent in his own name, but they must be granted to the inventor himself, who may then assign to the purchaser. Although a person cannot obtain a patent for an invention learned from another person within the realm; yet, if he have brought a new invention from abroad, and is the first to introduce it here, a patent may be granted to him as the true and first inventor.'[r]

Specification.

'Another condition which letters-patent, as now granted, contain, is that the inventor shall describe accurately the nature of his invention and the mode of performing it, by an instru-

[p] 15 and 16 Vict. c. 83.
[q] Amended by 2 & 3 Vict. c. 67, and 15 & 16 Vict. c. 83.
[r] *Edgeberry* v. *Stephens*, 2 Salk. 447.

ment under his hand and seal, to be filed in Chancery within a given time from the date of the grant. This instrument is called a specification, and its preparation is in practice found to be a matter of considerable difficulty. So numerous are modern inventions, and so minute are the points of difference between the processes used in the arts, that it is often not easy to steer clear of superfluous particulars, and to avoid including something which may have been known or used before, and which does not appertain to the essence of the invention. The effect of such inaccuracies in the specification, or of a discrepancy between the title of the invention contained in the letters-patent and the description on the specification, is to render the patent void *ab initio*. In order to remedy this, the statute 15 & 16 Vict. c. 83, s. 39, enables the grantee or assignee of letters-patent to enter a *disclaimer* of any part, either of the title of the invention or of the specification, and by this means the title may be validated from the time of entering the disclaimer.'

Disclaimer.

'A register of patents is provided, wherein all letters-patent are entered, as well as the deposit and filing of specifications, disclaimers, amendments, confirmations, and extensions of patents, and the date of their expiry or cancellation, and other matters affecting the validity of the patents. This register is open to public inspection. Letters-patent may be assigned from one person to another, or licenses under the hand and seal of the inventor, to use the invention, may be granted to other persons, which is, in ordinary cases, the most profitable mode of turning a patent to account. Assignments of patents, and licenses to use the protected invention, are required to be registered under the Patent Law Amendment Act, 1852.'

Register of patents.

'To such extent does the law recognise the right of inventors to profit by their ingenuity, a species of right having its origin, indeed, in nature, and in the principle of *occupancy* above mentioned, but which, in the present intricate and artificial state of society, must of necessity be regulated by arbitrary enactment rather than by any general rules of right.'

'9. 'There is still another species of personal property of very great importance, which is subject to very peculiar and special laws; I mean *ships*, to which a brief allusion may be made here. There has been much legislation on this subject,

Ships.

but the whole law relating to shipping has been recently consolidated in a single statute, "The Merchant Shipping Act, 1854,"[s] all former statutes being at the same time repealed.[t] The property in a ship has, from time immemorial, passed by *bill of sale*, or grant in writing, and not as in the case of most other chattels, by simple delivery of possession; but the statute law imposes the necessity of registration, in order to complete the title. Every ship is required, when first built, to be registered at some port, in the name of some owner or owners. For the purposes of registration, the property in the ship is divided into sixty-four shares, and not more than thirty-two persons can be registered at the same time as owners, and no person can be registered as owner of a fractional part of a share, though a number not exceeding five may be registered as joint owners of a single share. When a ship is to be transferred, it is done by bill of sale, containing a description of the ship, and in a form provided by the statute, which requires the conveyance to be executed by the transferor in the presence of one or more witnesses. Every such bill of sale, when executed, must be produced to the registrar of the port at which the ship is registered, and the name of the transferee is to be entered in the register-book as owner of the ship (or share) so transferred. The registered owner of any ship or share has power absolutely to dispose thereof, and to give effectual receipts for the consideration money; and no notice of any trust, express, implied, or constructive is admissible into the register. In a similar way, mortgages of ships or of shares in them may be made in a form provided by the statute, and such mortgages must be produced and entered in the register-book; and in the case of several mortgagees, the priority of entry in the register, and not the date of the mortgages themselves, absolutely determine the priority of right.

'The Board of Trade has some judicial and many administrative duties to perform, with reference to merchant shipping, which have been already mentioned in the previous volume of these Commentaries.'

[s] 17 & 18 Vict. c 104. This statute is amended by 18 & 19 Vict. c. 91.

[t] The Merchant Shipping Repeal Act, 17 & 18 Vict. c. 120.

CHAPTER XXVII.

OF TITLE BY PREROGATIVE AND FORFEITURE.

Title by prerogative.

A SECOND method of acquiring property in personal chattels is by the *royal prerogative:* whereby a right may accrue either to the Crown itself, or to such as claim under the title of the Crown; as by the queen's grant, or by prescription, which supposes an ancient grant.

Taxes and customs.

Such in the first place are all *tributes, taxes,* and *customs,* whether constitutionally inherent in the Crown, as flowers of the prerogative and branches of the *census regalis,* or ancient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the first volume. In these the sovereign acquires, and the subject loses, a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither, also, may be referred all forfeitures, fines, and amercements due to the sovereign, which accrue by virtue of his ancient prerogative, or by particular modern statutes; which revenues created by statute do always assimilate, or take the same nature with the ancient revenues, and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the sovereign or his grantee acquires it.

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Crown cannot be joint owner in a chattel.

In these several methods of acquiring property by prerogative, there is also this peculiar quality, that the Crown cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the Crown and a subject concur, the sovereign shall have the whole: in like manner as the Crown cannot, either by grant or contract, become a joint-

tenant of a chattel real with another person, but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the sovereign and a private person, the sovereign shall have the sole property: if a bond be made to the sovereign and a subject, the sovereign shall have the whole penalty, the debt or duty being one single chattel;[a] and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the sovereign, or is attainted, whereby his moiety is forfeited to the Crown, the sovereign shall have the entire horse, and entire debt.[b] For, as it is not consistent with the dignity of the Crown to be partner with a subject, so neither does the sovereign ever lose his right in any instance; but where they interfere, his is always preferred to that of another person;[c] from which two principles it is a necessary consequence, that the innocent, though unfortunate partner, must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.[d]

[a] Fitzh. Abr. tit. *Dette*, 38; Plowd. 243.

[b] Cro. Eliz. 263; Finch, Law. 178; 10 Mod. 245. If a joint-tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported by Plowden. Sir James Hales, a judge of the Common Pleas, and his wife, were joint tenants of a term for years; Sir James drowned himself, and was found *felo de se;* and it was held that the term did not survive to the wife, but that Sir James's interest was forfeited to the king by the felony, and that it consequently drew the wife's interest along with it. The argument of Lord Chief Justice Dyer is remarkably curious: "The felony (says he) is attributed to the act; which act is always done by a living man, and in his lifetime, as my brother Brown said; for he said Sir James Hales was dead; and how came he to his death? it may be answered, by drowning; and who drowned him? Sir James Hales; and when did he drown him? in his lifetime. So that Sir James Hales being alive caused Sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way but by divesting out of him, from the time of the act done in his lifetime, which was the cause of his death, the title and property of those things which he had in his lifetime."

This must have been a case of notoriety in the time of Shakespeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia.—[CHRISTIAN.]

[c] Co. Litt. 30.

[d] 'But for the benefit of commerce and trade, it is held that, on an extent against one of several partners, the beneficial interest of that one only can be taken. (*Rex* v. *Sanderson*, Wightw. 50.')

This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the Crown, without any transfer or derivative assignment, either by deed or law, from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like, which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the first book of these Commentaries; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the Crown, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

Franchises of the Crown.

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There is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the Crown upon different reasons. Thus, 1. The sovereign, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *Acts of Parliament*, *proclamations*, and *orders of council*. 2. As supreme head of the church, he has a right to the publication of all *liturgies*, and books of *divine service*. 3. He is also said to have a right, by purchase, to the copies of such *law-books*, *grammars*, and other compositions, as were compiled or translated at the expense of the Crown. And upon these two last principles combined, the exclusive right of printing the translation of the *Bible* is founded. 'However it seems to be agreed now, that both the Bible and statutes may be printed by others than those deriving the right from the grant of the Crown, provided such editions comprise *bonâ fide* notes; but with this exception, the sole right to print these works is now vested in the Universities of Oxford and Cambridge, and the patentees of the Crown.' [e]

Prerogative copyright.

There 'existed until lately' another species of prerogative property, founded upon a very different principle from any

Game.

[e] *Basket* v. *Cambridge University*, 2 Burr. 661.

that have been mentioned before; the property of such animals *feræ naturæ*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which 'at common law' was vested in the Crown alone, and thence derived to such subjects as had received the grants of a chase, a park, a free warren, or free fishery; on the origin of [411] which franchises, or royalties, we touched a little in a former chapter.

'The statute 1 & 2 Will. IV. c. 32, has put the law as to game upon quite a new footing; but the subject is one of so much prominence, in a historical point of view, that some more particular mention of it may be introduced in this place.'

In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *feræ naturæ*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian's time. "*Feræ igitur bestiæ, et volucres, et omnia animalia quæ mari,* "*cœlo, et terrâ nascuntur, simul atque ab aliquo capta fuerint,* "*jure gentium statim illius esse incipiunt. Quod enim nullius* "*est, id naturali ratione occupanti conceditur.*" But it follows, from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws, enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may, or may not, be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize. Many reasons have concurred for making these constitutions:

as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank, which would be the unavoidable consequence of universal licence. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people; which last is a reason oftener meant than avowed by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed; since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which, indeed, the law of nature would allow him, but of which the laws of society have, in most instances, very justly and reasonably deprived him. [412]

Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must, notwithstanding, acknowledge that they owe their immediate origin to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi gratiâ, potest a domino prohiberi ne ingrediatur.*" [f] For, if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law [g] interdicts "*venationes, et sylvaticas vagationes cum cani-*

[f] Inst. 2, 1. § 12.

[g] Decretal. l. 5, tit. 24, c. 2.

bus et accipitribus," to all *clergymen* without distinction: [413] grounded on a saying of St. Jerome,[h] that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of King Edgar,[i] concur in the same prohibition: though our secular laws, at least after the Conquest, did, even in the times of popery, dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof, we may observe, that it is to this day a branch of the royal prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof.[j]

But, with regard to the origin and rise of the civil prohibitions, 'which lately existed among us,' it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy as gave birth to the feudal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe on the ruins of the western empire. For, when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting; and therefore it was the policy of the Conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions,[k] one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for [414] destroying the game. This exclusive privilege well suited the martial genius of the conquering troops, who delighted

[h] Decret. part 1, dist. 34, l. 1.

[i] Cap. 64; 2 Thorpe, 259.

[j] 4 Inst. 309.

[k] Feud. l. 2, tit. 27, § 5.

in a sport[1] which in its pursuit and slaughter bore some resemblance to war. *Vita omnis* (says Cæsar, speaking of the ancient Germans) *in venationibus atque in studiis rei militaris consistit.*[m] And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt.*[n] And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning than was couched in such rude ditties as were sung at the solemn carousals which succeeded these ancient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigour. In France, 'before the Revolution,' all game 'was' the king's; and in some parts of Germany it has been said to be death for a peasant to be found hunting in the woods of the nobility.[o]

With us in England, also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without enclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But, when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desert tracts, which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the Crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute, and of Edward the Confessor:[p] "I will that every man be [415]

[1] In the laws of Gengis Khan, founder of the Mogul and Tartarian empire, published A.D. 1205, there is one which prohibits the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

[m] De Bell. Gall. l. 6, c. 20.

[n] C. 15.

[o] Mattheus de Crimin. c. 3, tit. 1; Carpzov. Practic. Saxonic. p. 2, c. 84.

[p] 1 Thorpe, 421.

"entitled to his hunting in wood and in field, on his own "possessions. And let every one forego my hunting; take "notice that I will have it untrespassed on, under penalty of "the full 'wite' (fine):" which indeed was the ancient law of the Scandinavian continent, from whence Canute probably derived it. "*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum.*"[q]

However, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or *venery*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorised under him. And this, as well upon the principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that, therefore, he has the right of the universal soil, to enter thereon, and to chase and take such creatures, at his pleasure; as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the Crown by this prerogative. As, therefore, the former reason was held to vest in the king a *right* to pursue and take them anywhere; the latter was supposed to give the king, and such as he should authorise, a *sole* and *exclusive* right.

This right, thus newly vested in the Crown, was exerted with the utmost rigour, at and after the time of the Norman establishment; not only in the ancient forests, but in the new [416] ones which the Conqueror made by laying together vast tracts of country, depopulated for that purpose, and reserved solely for the royal diversion; in which were exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, King John laid a total interdict upon the *winged* as well as the *four-footed* creation: "*capturam avium per totam Angliam interdixit.*"[r] The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation

[q] Stiernhook, de Jure Sueon. l. 2, c. 8.

[r] M. Paris, 303.

of the feudal rigours, and the other exactions introduced by the Norman family; and accordingly we find the immunities of *Charta de Forestâ* as warmly contended for, and extorted from the king with as much difficulty as those of *Magna Charta* itself. By this charter, confirmed in Parliament,[s] many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly killing the king's deer was made no longer a capital offence, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the Crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

But, as the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects, under the names of *chases* or *parks*, or gave them license to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and, by the common law, no person is at liberty to take or kill any beasts of chase, but such as has an ancient chase or park; unless they be also beasts of prey.

[417] As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the Crown, and called *free warren;* a word, which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a *free fishery;* of which, however, no new franchise can at present be granted by the express provision of *Magna Charta,* c. 16. The principal intention of granting to any one these franchises or liberties was, in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And 'formerly, therefore,' no man, but he who had a chase or free warren, by grant from the Crown, or prescription, which supposes one, could justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

'The statute 22 & 23 Car. II. c. 25 exempted from the

[s] 9 Hen. III.

penalties of the old law certain classes of persons, namely, the owners of lands and tenements in possession of the yearly value of 100*l*., or for life, or ninety-nine years, or upwards, of the yearly value of 150*l*.; and other persons might also be qualified, under this Act, to take and kill game, as the son and heir apparent of an esquire, or other person of higher degree, or the gamekeeper of the lord of a manor. It was also made requisite for persons thus qualified to be sportsmen, to take out a yearly certificate, involving the payment of a certain amount of duty. But by statute 1 & 2 Will. IV. c. 32, the arbitrary distinctions of *qualification* have been done away with, and now the right to kill game upon any land is vested in the owner or occupier thereof (in the absence of a reservation of the right by the landlord), and any person with permission of the owner may kill game on any land. But the Act requires all persons killing or taking game to take out a yearly certificate, and persons selling it must also obtain a yearly license. The effect of this Act seems to be virtually to vest the property in game in the owner of the land, wherever it is found, although he cannot avail himself of such right of property without the required certificate.'

[419] 'And the property which a man may have in game is not' absolute or permanent, but lasts only so long as the creatures remain within the limits of 'his land.' It has been held, indeed, that if a man starts game within his own ground, and follows it into another's, and kills it there, the property remains in himself.[t] 'But under the present law it would seem that the property will belong to him on whose ground it was killed;[u] for formerly' if a stranger started game in one man's chase or free warren, and hunted it into another liberty, the property continued in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man started game on another's private grounds, and killed it there, the property belonged to him in whose ground it was killed, because it was also started there; this property arising *ratione soli*. Whereas, if, after being started there, it were killed in the grounds of a third person, the property belonged not to the owner of the first ground, because the property is local; nor yet to the

[t] 11 Mod. 75.

[u] 1 & 2 Will. IV. c. 32, s. 36.

owner of the second, because it was not started in his soil; but it vested in the person who started and killed it,[v] though guilty of a trespass against both the owners.

III. I proceed now to a third method, whereby a title to goods and chattels may be acquired and lost, viz., by *forfeiture;* as a punishment for some crime or misdemeanor in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter. It remains, therefore, in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

In the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures inflicted by special statutes for particular crimes and misdemeanors: some of which are *mala in se,* or offences against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita,* or such as derive their guilt merely from their prohibition by the laws of the land: such as 'was formerly' the forfeiture of 40*s.* *per* month by the statute 5 Eliz. c. 4, for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann. c. 23, for printing an almanack without a stamp; 'both of which forfeitures have been abolished.' I shall, therefore, confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the Crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeiture, a moiety often goes to the informer, the poor, or sometimes to other persons, I have, therefore, made it a distinct head of transferring property. [421]

[v] Farr. 18; Lord Raym. 251; *Churchyard* v. *Studdy,* 14 East. 249.

Forfeiture by convicted persons.

Goods and chattels, then, are totally forfeited by conviction of *high treason* or *misprision* of treason; of *felony* in general, and in particular of *felo de se*, and of *manslaughter;* by *outlawry* for treason or felony; by conviction of *larceny;* by *drawing a weapon on a judge*, or *striking* any one *in the presence of the queen's courts;* by *præmunire*, and by *pretended prophecies*, upon a second conviction.[w] All these offences, as will more fully appear in the fourth book of these Commentaries, induce a total forfeiture of goods and chattels.

And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. 'And, therefore, a *bonâ fide* sale of goods or chattels by the offender, after the offence and before conviction, is good.'[x] Yet a fraudulent conveyance of them, to defeat the interest of the Crown, is made void by statute 13 Eliz. c. 5.

[w] 'Sir William Blackstone includes among the offences for which, on conviction, a forfeiture followed: 1, *petit treason*, now unknown to the law (9 Geo. IV. c. 31, s. 2): 2, *flight* in treason or felony, even though the party be acquitted of the fact; but, on indictments for felony, the jury is no longer to inquire into the flight (7 & 8 Geo. IV. c. 28, s. 5): 3, *standing mute*, when arraigned of *felony*, which can no longer happen, as a plea of *not guilty* will be recorded (7 & 8 Geo. IV. c. 28, s. 2): 4, *owling*, or the offence of transporting wool or sheep out of the kingdom, no longer an offence (5 Geo. IV. c. 47): 5, *the residing abroad of artificers*, the laws restraining which are repealed (5 Geo. IV. c. 97): and 6, the *challenging to fight* on account of money won at gaming, a misdemeanor no longer involving forfeiture (9 Geo. IV. c. 61, s. 1).'

[x] *Whitaker* v. *Wisbey*, 12 C. B. 44.

CHAPTER XXVIII.

OF TITLE BY CUSTOM.

[422] A FOURTH method of acquiring property in things personal, or chattels, is by *custom:* whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should I attempt to enumerate all the several kinds of special customs which may entitle a man to a chattel interest in different parts of the kingdom: I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz., *heriots, mortuaries,* and *heir-looms.*

1. Heriots.

1. Heriots, which were slightly touched upon in a former chapter, are usually divided into two sorts: heriot-*service* and heriot-*custom.* The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to a little more than a mere rent:[a] the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom.[b] Of these, therefore, we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

[423] The first establishment, if not introduction, of compulsory heriots into England, was by the Danes; and we find in the laws of King Canute[c] the several *heregeates,* or heriots, specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorl* down to the most inferior *thegn,* or landholder. These, for the most part, consisted in arms,

[a] 2 Saund. 166. [b] Co. Cop. § 24. [c] 1 Thorpe, 415.

horses, and habiliments of war; which the word itself, according to Sir Henry Spelman,[d] signifies. These were delivered up to the sovereign on the death of the vassal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the Conqueror fashion his law of reliefs; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feudal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money.[e]

The Danish compulsive heriots being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day in the shape of a double rent, payable at the death of the tenant; the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary.[f] These are now, for the most part, confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villenage, when all his goods and chattels were quite at the [424] mercy of the lord; and custom, which has on the one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretional piece of gratitude into a permanent duty. A heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton[g] speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia præstatio quæ nominatur heriettum; ubi tenens, liber vel servus, in morte suâ dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem.*" And this he adds, "*magis fit de gratiâ quam de jure;*" in which Fleta[h] and Britton[i] agree; thereby plainly intimating the origin of this custom to have

[d] Of Feuds, c. 18.
[e] LL. Guil. Conq. c. 22, 23, 24.
[f] Lambard. Peramb. of Kent, 492.
[g] L. 2, c. 36, § 9.
[h] L. 3, c. 18.
[i] C. 69.

been merely voluntary, as a legacy from the tenant; though now immemorial usage has established it as of right in the lord.

This heriot is sometimes the best live beast or *averium*,[j] which the tenant dies possessed of (which is particularly denominated the villein's relief, in the twenty-ninth law of William the Conqueror), sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant, who was the owner of it, being ascertained by the option of the lord,[k] becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore, on the death of a feme-covert, no heriot can be taken: for she can have no ownership in things personal.[l] In some places, there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably ancient custom; but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible. 'And indeed, heriots themselves will, in course of time, cease to be exigible, one of the Copyhold Enfranchisement Acts (15 & 16 Vict. c. 51, s. 27) having enabled either lord or tenant to compel the extinguishment of this ancient feudal burden.'

[425]

2. Mortuaries.

2. Mortuaries are a sort of ecclesiastical heriots, being a customary gift claimed by, and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us, from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, *after*[m] the lord's heriot or best good was taken out, 'the second-best chattel was reserved to the church as a mor-

[j] *Holloway* v. *Berkeley*. 6 B. & C. 2.

[k] Hob. 60.

[l] Keilw. 84; 4 Leon. 239.

[m] Co. Litt. 185.

tuary: "*si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiæ suæ sine dolo, fraude, seù contradictione quâlibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animæ suæ.*"[n] And, therefore, in the laws of Canute,[o] this mortuary is called soul-scot (ꞅawlꞅceaꞇ) or *symbolum animæ.* And, in pursuance of the same principle, by the laws of Venice, where no personal tithes had been paid during the life of the party, they were paid at his death out of his merchandise, jewels, and other moveables.[p] So, also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession,* was formerly deprived of Christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the Parliament in 1409, redressed this grievance.[q]

It was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence[r] it is sometimes called a *corse-present:* [426] a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry III., we find it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de aliâ meliori:*" the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci.*"[s] This custom still varies in different places, not only as the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary, or corse-present, was due upon the death of every clergyman to the

[n] Provinc. l. 1, tit. 3.
[o] C. 13; 1 Thorpe, 369.
[p] Panorm. ad Decret. l. 3 t. 20, c. 32.
[q] Sp. L. b. 28, c. 41.
[r] Selden, Hist. of Tithes, c. 10.
[s] Bracton, l. 2, c. 26; Flet. l. 2, c. 57

bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the archdeaconry of Chester, a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring.[t] But by statute 28 Geo. II. c. 6, this mortuary was directed to cease, the Act having settled upon the bishop an equivalent in its room. The claim of the Crown to many goods, on the death of all prelates in England, seems to be of the same nature; though Sir Edward Coke[u] apprehends that this is *a duty due upon death* and not a *mortuary:* a distinction which seems to be without a difference. For not only the sovereign's ecclesiastical character as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The Crown, according to the record vouched by Sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tippet; his cup and cover; his bason and ewer; his gold ring; and lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter. [427]

Stat. 21 Hen. VIII. c. 6.

This variety of customs, with regard to mortuaries, giving freqently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper, by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose, it is enacted, that all mortuaries, or corse-presents, to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: viz., for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value soever they may be, 10*s.* and no more. And no mortuary shall, throughout the kingdom, be paid for the death of any feme-covert; nor for any child; nor for any one of full age that is

[t] Cro. Car. 237.

[u] 2 Inst. 491.

not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And, 'although *mortuaries*, which are not to be confounded with *burial fees*,[v] as such, are now almost unknown,' upon this statute stands the law to this day.

3. Heir-looms.

3. Heir-looms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon origin, in which language it signifies a limb or member;[w] so that an heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor.[x] [428] But deer in a real authorised park, fishes in a pond, doves in a dove-house, &c., though in themselves personal chattels, yet they are so annexed to, and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase.[y] For this reason also, I apprehend it is, that the ancient jewels of the Crown are held to be heir-looms;[z] for they are necessary to maintain the State, and support the dignity of the sovereign for the time being. Charters, likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor.[a] By special custom, also, in some places, carriages, utensils, and other household implements, may be heir-looms;[b] but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab ædibus non facile revellitur*,"[c] is become a member of the inheritance, and shall thereupon pass to the heir, chimney-pieces, pumps, old fixed

Charters, court-rolls, &c.

v Willes, 538 n.
w Spelm. Gloss. 277.
x Co. Litt. 388.
y Co. Litt. 8.
z Co. Litt. 18.
a Bro. Abr. tit. *Chattels*, 18.
b Co. Litt. 18, 185.
c Spelm. Gloss. 277.

or dormant tables, benches and the like.[d] A very similar notion to which formerly prevailed in the duchy of Brabant, where they ranked certain things moveable among those of the immoveable kind, calling them by a very particular appellation, *prædia volantia*, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes), "*dignitatem istam nacta sunt, ut villis, sylvis, et ædibus, aliisque prædiis, comparentur; quod solidiora mobilia ipsis ædibus ex destinatione patrisfamilias cohærere videantur, et pro parte ipsarum ædium æstimentur.*"[e]

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone, in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but if he do so is liable to an action by the heir.[f] Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir.[g] But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes, nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains when dead and buried, 'although the offenders may be indicted for the misdemeanor.'[h] The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony;[i] for the property thereof remains in the executor, or whoever was at the charge of the funeral, 'while taking the body itself is only a misdemeanor, for there can be no property therein in any one.'[j]

[429]

Pews.

But to return to heir-looms: these, though they be mere chattels, yet cannot be devised away from the heir by will;

[d] 12 Mod. 520.

[e] Stockman, *de Jure Devolutionis*, c. 3, § 16.

[f] 12 Rep. 105; Co. Litt. 18.

[g] 3 Inst. 202; 12 Rep. 105.

[h] *Rex* v. *Duffin*, Russ. & R. Crim. C. 365.

[i] 3 Inst. 110; 12 Rep. 113; 1 Hal. P. C. 515.

[j] *Rex* v. *Duffin*, Russ. & R. C. C., 365.

but such a devise is void,[k] even by a tenant in fee-simple. For, though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

[k] Co. Litt. 185; 1 P. Wms. 730.

CHAPTER XXIX.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IN the present chapter we shall take into consideration three other species of titles to goods and chattels. [430]

V. Succession.

V. The fifth method, therefore, of gaining a property in chattels, either personal or real, is by *succession:* which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and, therefore, the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate.[a] Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give anything to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists And thus a lease for years, an obligation, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

Corporation.

[431]

Corporations sole.

But, with regard to sole corporations, a considerable distinction must be made. For, if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; or the dean of some ancient cathedral, who stands

[a] 4 Rep. 65.

[b] Bro. Abr. t. *Estates*, 90; Cro. Eliz. 464.

in the place of, and represents in his corporate capacity the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative.[c] Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and, therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it.[d] For, the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John Bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that, if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, [432] the property thereof must be in abeyance from the death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner;[e] but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest, therefore, in such a case, is really and substantially vested in the hospital, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule,

[c] Dyer, 48; Cro. Eliz. 464. [d] Co. Litt. 46. [e] Brownl. 132.

with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession.[f]

Yet, to this rule there are two exceptions. One in the case of the Crown, in whom a chattel may vest by a grant of it formerly made to a preceding sovereign and his successors.[g] The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interest than such immemorial usage will strictly warrant. Thus, the Chamberlain of London, who is a corporation sole, may, by the custom of London, take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund:[h] but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule: that such right of succession to chattels is universally inherent by the common law in all aggregate corporations, in the sovereign, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist. [433]

VI. A sixth method of acquiring property in goods and chattels is by *marriage;* whereby those chattels which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property, and with the same powers as the wife, when sole, had over them. (VI. Marriage.)

This depends entirely on the notion of a unity of person between the husband and wife; it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence

[f] Co. Litt. 46. [g] Co. Litt. 90. [h] 4 Rep. 65; Cro. Eliz. 862.

it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the courtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

[434]

Wife's chattels real vest in husband *sub modo.*

There is, therefore, a very considerable difference in the acquisition of this species of property by the husband, according to the subject-matter, viz., whether it be a chattel *real*, or a chattel *personal;* and, of chattels personal, whether it be in *possession* or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo.* As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture:[i] if he be outlawed or attainted, it shall be forfeited to the Crown;[j] it is liable to execution for his debts;[k] and, if he survives his wife, it is to all intents and purposes his own.[l] Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will;[m] for, the husband having de no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action;* as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. 'For the mere *intention* on the part of the husband to reduce the wife's choses in action is not sufficient. Thus an agreement to sell a fund

[i] Co. Litt. 46; *Tudor* v. *Samyne*, 4 M. & Cr. 389, note.

[j] Plowd. 263.

[k] Co. Litt. 351.

[l] Co. Litt. 300.

[m] Poph. 5; Co. Litt. 351.

to which the wife is entitled is not a reduction into possession;[n] the acts to effect this must be such as to divest the wife's property, and make that of the husband absolute; such as a judgment recovered in an action by him alone, or receipt of the money, or the decree of a court of equity for payment to him or for his use.[o]' And upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But if he dies before he has recovered or reduced them into possession, so that, at his death, they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them.[p] And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property: but, if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs;[q] for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same, in case the wife survives the husband; but in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action:* for he shall have the *chattel real* by survivorship, but not the *chose in action;*[r] except in the case of [435] arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a

[n] Pre. Ch. 412, 418. 'Where the wife's interest is an equitable one, or when from any circumstances the assistance of a court of equity is required in order to reduce the property into possession, the court will not render its assistance, except on the terms of some part, or in some cases the whole, being settled to the use of the wife and her children. This is the *wife's equity;* and this equity has been administered even against the assignees in insolvency of the husband claiming, during the joint lives of the husband and wife, the entire benefit of a legal estate vested in the wife for life. (*Sturgis* v. *Champneys*, 5 Myl. & C. 97; *Hanson* v. *Keating*, 4 Hare, 1.)'

[o] *Twisden* v. *Wise*, 1 Vern. 161.

[p] Co. Litt. 351.

[q] Co. Litt. 351.

[r] 3 Mod. 186.

chose in action shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right: but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture. 'With regard to a wife's *reversionary choses in action*, these cannot from their nature be reduced into possession; so that they cannot be affected by the husband even with the concurrence of the wife.[s]'

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real* and *choses in actions:* but, as to *chattels personal* (or *choses*) *in possession*, which the wife has in her own right, as ready money, jewels, household goods and the like, the husband has therein an immediate and absolute property, devolved to him by the marriage, not only potentially, but in fact, which never can again revest in the wife or her representatives.[t]

And, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to the executors. These are called her [436] *paraphernalia;* which is a term borrowed from the civil law,[u] and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and, therefore, even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia.*[v] These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives.[w] Neither can the husband devise by his will such ornaments and jewels of his wife; though during

Paraphernalia.

[s] *Story* v. *Tonge*, 7 Beav. 91.
[t] Co. Litt. 352.
[u] Ff. 23, 3, 9. § 3
[v] Moor. 213.
[w] Cro. Car. 343; 1 Roll. Abr. 911. 2 Leon. 166

his life he has the power (if unkindly inclined to exert it) to sell them or give them away.[x] But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets.[y] And her necessary apparel is protected even against the claim of creditors.[z]

VII. Judgment.

VII. A judgment, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action;* as, if a man gives a bond for 20*l.*, or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a remedy to recover the possession of that right, which already in justice belongs to him. [437] But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Penalties.

1. Such penalties as are given by particular statutes, to be recovered on an action *popular;* or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.* which those persons are by several Acts of Parliament made liable to forfeit, that, being in particular

[x] Noy's Maxims, c. 49; *Graham* v. *Lord Londonderry*, 3 Atk. 394.

[y] 1 P. Wms. 730; 3 Atk. 369, 393.

[z] Noy's Max. c. 49.

offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A. or B., has any right, claim, or demand, in or upon this penal sum, till after action brought;[a] for he that brings his action, and can *bonâ fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of everybody else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained.[b] But, otherwise, the right so attaches in the first informer, that the sovereign (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced, remit anything but his own part of the penalty.[c] For by commencing the suit, the informer has made the popular action his own private action, and it is not in the power of the Crown, or of anything but parliament, to release the informer's interest. This, therefore, is one instance where a suit and judgment at law are not only the means of [438] recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed, as it were, in a state of nature, accessible by all, but the acquired right of none: open therefore to the first occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. Damages.

2. Another species of property that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true that this is not an acquisition so perfectly

[a] 2 Lev. 141; Stra. 1169; *Combe* v. *Pitt*. 3 Burr. 1423.

[b] Stat. 4 Hen. VII. c. 20.

[c] Cro. Eliz. 138; 11 Rep. 65.

original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

[439] Costs.

3. Hither also may be referred, upon the same principle, all title to costs and expenses of suit, which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum*, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

CHAPTER XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. Gift or grant.

VIII. Gifts, then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated; though these very seldom carry the outward appearance of a gift, however freely bestowed, being usually expressed to be made in consideration of blood or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn; any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

Of chattels real.

[441]

Of chattels personal.

Grants or gifts of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein; which may be done either in writing, or by word of mouth, 'accompanied by an actual' delivery

of possession 'to the donee.'[a] But this conveyance, when merely voluntary, is somewhat suspicious, and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And particularly by statute 3 Hen. VII. c. 4, all deeds of gift of goods, made in trust to the use of the donor, shall be void; because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture, and the creditors of the donor might also be defrauded of their rights. By the statute 13 Eliz. c. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others,[b] shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual: and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the Crown, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.[c] 'And now by the statute 17 & 18 Vict. c. 36, s. 1, bills of sale, which is the usual denomination of a grant of chattels personal, must be filed with the clerk of docquets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving them; otherwise any such grant will, as against assignees in bankruptcy or insolvency, or creditors, be null and void.'

Fraudulent gifts, Stat. 3 Hen. VII. c. 4.

Stat. 13 Eliz. c. 5.

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately; as if A. gives to B. 100*l.*, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense;[d] unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pre-

[a] *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Shower* v. *Pilck*, 4 Ex. 478.

[b] See 3 Rep. 82.

[c] 'The question of fraud is one of fact to be decided by a jury. (*Twyne's case*, 3 Rep. 80; 1 Smith's Lead. Cas. 4th ed. p. 6.) The mere retention of the possession of chattels granted to another is not necessarily fraudulent under this statute, and a conditional sale of goods is not invalidated by the mortgagor continuing to keep possession thereof, although a question may arise, under the Bankrupt Laws, whether in such case the transaction be good against the assignees.' See *post*, ch. 31, Title by Bankruptcy.

[d] Jenk. 109.

tences, inebriety,[e] or surprise. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform but upon good and sufficient consideration, as we shall see under our next division.

[442]

X. Contract.

IX. A contract, which usually conveys an interest merely in action is thus defined: "an agreement upon sufficient consideration to do or not to do a particular thing." From which definition there arise three points to be contemplated in all contracts; 1. The *agreement:* 2. The *consideration:* and 3. The *thing* to be done or omitted, or the different species of contracts.

1. The agreement.

First, then, it is an *agreement,* a mutual bargain or convention, and, therefore, there must at least be two contracting parties, of sufficient ability to make a contract; as where A. contracts with B. to pay him 100*l.*, and thereby transfers a property in such sum to B.; which property is, however, not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law: for no *chose in action* could be assigned or granted over, because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law.[f] But this nicety is now disregarded; though, in compliance with the ancient principle, the form of assigning a *chose in action* is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And

[e] *Gore* v. *Gibson,* 13 M. & W. 623.

[f] Co. Litt. 214. 'To this rule of the common law there are several exceptions. *Bills of exchange,* by the Law Merchant, may be transferred by indorsement, and sued on by the assignee, who is then called the indorsee; and the statute 3 & 4 Ann., c. 9, places *promissory notes* on the same footing. This statute was passed in consequence of the refusal of Lord Holt (in *Clerk* v. *Martin,* 2 Ld. Raym. 757) to yield to the custom which had sprung up among merchants of treating promissory notes as *negotiable,* in the same way as bills of exchange. His Lordship treated the attempt of the merchants with great indignation, saying, "that it proceeded from the opinionativeness of the merchants, who were endeavouring to set the law of Lombard-street against the law of Westminster Hall." *Drafts on bankers* are equally negotiable. *Bills of lading* constitute a fourth exception. These are transferred by indorsement, and not only is the property in the goods thereby passed to the indorsee, but also all *rights of suits* and *all the liabilities* of the original contractors, the shipper and the shipowner.' (18 & 19 Vict. c. 111.)

therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name, the person to whom it is transferred being rather an attorney than an assignee. But the sovereign is an exception to this general rule, for the Crown might always either grant or receive a *chose* in action by assignment;[g] and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession.[h]

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Express contracts.

This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook, or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts which runs through and is annexed to all other contracts, conditions, and covenants, viz., that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which, indeed, is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quasi ex contractu*.[i]

Implied.

Executed.

A contract may also be either *executed*, as if A. agrees to change horses with B., and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal pro-

Executory.

[g] Dyer, 30; Bro. Abr. tit *Chose in action*, 1 & 4.

[h] 3 P. Wms. 199.

[i] Inst. 3, 14, 2.

perty in each other's horse is not in possession but in action; for a contract *executed* (which differs in nothing from a grant) conveys a *chose in possession;* a contract *executory* conveys only a *chose in action.*

2. The consideration.

Having thus shown the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party [444] to enter into the contract. "It is an agreement upon *sufficient consideration.*" The civilians hold, that, in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal.[j] This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen, is that of blood or natural affection between near relations; the satisfaction accruing from which, the law esteems an equivalent for whatever benefit may move from one relation to another.[k] 'And this, therefore, will support a use under the statute 27 Hen. VIII. c. 10, or a trust executed in equity, though it is not sufficient whereon to ground an action at law; and may' sometimes be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

Valuable consideration.

These valuable considerations are divided by the civilians into four species: 1. *Do, ut des:* as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio ut facias:* as, when I

[j] *In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.* Gravin. l. 2, § 12.

[k] 3 Rep. 83.

agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A., the tenant, will repair his house, B., the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides; as, that in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des:* when a man agrees to perform anything for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias:* which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages, upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det,* and *herus dat, ut servus faciat.*

[445]

Nudum pactum.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law: and a man cannot be compelled to perform it. As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide: certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: the maxim of our law being that *ex nudo pacto non oritur actio.*[1] But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum.*

[1] Bro. Abr. tit. *Dette,* 79; Salk. 129.

[446] We are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing.*" The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange.* 2. That of *bailment.* 3. That of *hiring* and *borrowing.* 4. That of *debt.*

1. Sale or exchange.

1. Sale or *exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo.* If it be a commutation of goods for goods, it is more properly an *exchange;* but, if it be a transferring of goods for money, it is called a *sale:* which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah: though the practice of exchanges still subsists among several of the savage nations. But, with regard to the *law* of sales and exchanges, [447] there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place, where the vendor *hath* in himself, and, secondly, where he *hath not* the property of the thing sold.

Where the vendor *hath* in himself the property of the goods sold, he has the liberty of disposing of them to whomever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the 'purchaser has notice that a' writ of execution is actually delivered to the sheriff. For by the Statute of Frauds,[m] the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt from the time

[m] 29 Car. II. c. 3. 'See the operation of this statute as to leasehold estates, *Westbrook* v. *Blythe*, 3 El. & Bl. 737.'

of delivering the writ 'to the sheriff. Previously to this statute, the property' was bound from the *teste*, or issuing of the writ,[n] and any subsequent sale was fraudulent. The law was 'first' altered in favour of *purchasers*, 'by the enactment of the Statute of Frauds, that the property should be bound only from the time of delivering the writ to the sheriff; but this being found very insufficient, further protection has been extended to innocent buyers of goods, by the Mercantile Law Amendment Act, 1856. For no writ of execution or attachment shall now prejudice the title to goods acquired by any person *bonâ fide* and for a valuable consideration, *before the actual seizure or attachment*, provided such person had not at the time notice that the writ was in the hands of the sheriff.' Between the *parties* 'the law remains as it was before the Statute of Frauds,' and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.[o]

If a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says, he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases.[p] But, if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest* (which the civil law calls *arrha*, and interprets to be *emptionis-venditionis contractæ argumentum*)[q] the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them. And such regard does the law pay to earnest as an evidence of a contract, that, by the Statute of Frauds (29 Car. II. c. 3), no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of

Earnest.

[448]

n 8 Rep. 171; 1 Mod. 188.
o Comb. 33; 12 Mod. 5; 7 Mod. 95.
p Hob 41; Noy's Max. c. 42.
q Inst. 3, tit. 24.

earnest on his part;[r] or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment;[s] or unless some note in writing 'of the bargain'[t] be made and signed by the party, or his agent, who is to be charged with the contract.[u] 'And this enactment is, by Lord Tenterden's Act (9 Geo. IV. c. 14) extended to all contracts for the sale of goods of the value of 10*l.* sterling, or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made or provided, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.' With regard to goods under the value of 10*l.*, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, "*venditio per mutuam manuum complexionem*:"[v] till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

Handsel.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on.[w] But, if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B. for 10*l.* and B. pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the contract the property was in the vendee. 'But in one particular

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[r] *Morton* v. *Tibbett*, 15 Q. B. 428; *Hunt* v. *Hecht*, 8 Ex. 814.

[s] *Walker* v. *Nursey*, 16 M. & W. 302; *Elliot* v. *Pybus*, 10 Bing. 512.

[t] *Duke* v. *Andrews*, 2 Ex. 290.

[u] *Graham* v. *Matson*, 5 Bing. W. C. 607; *Goom* v. *Aflalo*, 6 B. & C. 117.

[v] Stiernhook, de Jure Goth. l. 2, c. 5.

[w] Hob. 41.

instance, where the act of transfer is not completed, the right of property transferred by the sale to the vendee may be divested by an act of the vendor, this occurring when the vendor exercises that right conferred on him by the Law Merchant, which is termed the right of *stoppage in transitu*. For where the parties deal on credit, that is, when the contract is in fact for the immediate delivery of the goods, but for the future payment of the money, it may sometimes happen that before the delivery has been completed, the vendor may discover that the vendee is insolvent, and that he will therefore be unable to perform his part of the contract, when the time arrives for so doing. The law, in this case, allows the vendor, if he can, to prevent the goods coming into the possession of the vendee. If the vendor has not parted with the goods at all, he may retain them; but if they have already been put into the hands of some third party, as a carrier, for delivery, he may give notice to such party, who thereupon becomes bound to retain them; and after notice, should he by mistake deliver them, the vendor may bring *trover* for them even against the assignees of the vendee, if he have in the meantime become bankrupt.[x] Nor will partial payment destroy this right, for the effect of the stoppage *in transitu* is not to rescind the contract, which cannot be done after part-payment, but its operation is to create an equitable lien upon the goods, which may be retained until full payment be made,[y] the vendee or his assigns being then entitled to the goods. This right of stoppage ceases entirely, and cannot be exercised, when the goods have come actually or constructively into the hands of the vendee; as if after the goods have been sold, they remain in the vendor's warehouse, he receiving warehouse rent for them. In such a case the vendor holds the goods as the agent of the vendee, the delivery is considered complete, and the right of stoppage *in transitu* at an end.'[z]

Stoppage *in transitu*.

'This right of an unpaid vendor to stop the goods before they reach the hands of the purchaser, cannot be exercised where the goods have been consigned by a bill of lading, and that instrument has been indorsed over by the consignee. A bill of lading is an acknowledgment signed by the master of a

Bill of lading.

[x] *Litt* v. *Cowley*, 7 Taunt. 169.
[y] *Clay* v. *Harrison*, 10 B. & C. 99.
[z] *Hurry* v. *Mangles*, 1 Campb. N. P. 452.

ship of the receipt of goods which he undertakes to deliver at some foreign port, to a person therein named or to his assigns, upon payment of freight and other dues. Several copies of this document are made out, one of which the merchant sends to the consignee by the ship itself, another by post or some other conveyance. By the Custom of Merchants, which is part of the *Lex Mercatoria*, a bill of lading is transferable by indorsement, and by this indorsement the right of property in the goods passes to the indorsee.[a] The consignor of the goods has a right to stop the goods *in transitu* upon the insolvency or bankruptcy of the consignee, but he cannot do so against an assignee for value of the bill of lading, who had no notice of the insolvency.[b] This doctrine is at variance with the general principle of our law, which does not permit anyone to transfer a greater right than he has himself.'

'And here I may add that by the statute 18 & 19 Vict. c. 111, s. 3, it is enacted that every consignee named in a bill of lading, and every indorsee of a bill of lading to whom the property therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.'

Sale by one who is not owner.

'Hitherto of the transfer of property in goods' by sale, where the vendor *hath* such property in himself.' But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase, otherwise all commerce between man and man must soon be at an end. And therefore the general rule of the law is,[c] that all sales and contracts

[a] 'Between the shipper and the master of the vessel, the bill of lading is not conclusive evidence that the goods therein mentioned have been shipped. (*Bates* v. *Todd*, 1 Mood. & Rob. 106.) But in the hands of a consignee or indorsee for valuable consideration it is, in the absence of actual notice to the contrary, conclusive evidence of the shipment, as against the master or other person signing the same. (18 & 19 Vict. c. 111, s. 3.) It is not conclusive on the *shipowner*, for he is not bound by the acts of the master, except so far as they are done within the scope of his authority; and the master of a ship has no authority to sign for goods not actually on board his vessel.' (*Grant* v. *Norway*, 11 C.B. 615.)

[b] *Lickbarrow* v. *Mason*, 2 T. R. 683; 1 Smith's Lead. Cas. 4th ed. 595.

[c] 2 Inst. 713.

of anything vendible, in fairs or markets *overt* (that is, open), shall not only be good between the parties, but also be binding on all those that have any right of property therein. And for this purpose, the Mirror informs us,[d] were tolls established in markets, viz., to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses.[e] Market overt in the country is only held on the special days provided for particular towns by charter or prescription; but in London every day, except Sunday, is market-day.[f] The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt;[g] but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in.[h] But if my goods are stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them.[i] And it is expressly provided by statute 1 Jac. I. c. 2, that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule.[j] And even in market overt, if the goods be the property of the Crown, such sale (though regular in all other respects) will in no case bind the sovereign, though it binds infants, feme-coverts, idiots, or lunatics, and men beyond sea or in prison. So likewise, if the buyer knows the property not to be in the seller; or there be any other fraud in the transaction; if he knows the seller to be an infant, or feme-covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby.[k] If a man buys his own goods

Sale in market overt.

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[d] C. 1, § 3.

[e] LL. Ethel. 10, 12; LL. Eadg.; 1 Thorpe, 275.

[f] Cro. Jac. 68.

[g] Godb. 131.

[h] 5 Rep. 83; 12 Mod. 521.

[i] *White* v. *Spettigue*, 13 M. & W. 603.

[j] 'The owner of goods unlawfully pawned, who suspects them to be in the possession of any pawnbroker, may obtain a search-warrant from a justice of the peace, and should the goods be found they will be restored to him.' (39 & 40 Geo. III. c. 99; 9 & 10 Vict. c. 98.)

[k] 2 Inst. 713, 714; 5 B. & Al. 624.

in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale.[l] And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice.[m] By which wise regulations, the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bonâ fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

Sale of horses.

There is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses.[n] For a purchaser gains no property in a horse that has been stolen, 'even if' it be bought in a fair or market overt, 'unless the sale be' according to the directions of the statute 31 Eliz. c. 12; by which it is enacted, that the 'sale of a horse shall be void, unless the [451] toll-taker or book-keeper of the market, either from his own knowledge, or on the testimony of some creditable person, shall enter in his book the name, addition, and abode of the vendor, and the price given for the horse.'[o] Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

Warranty.

By the civil law[p] an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, a purchaser of goods and chattels may have a satisfaction

[l] Perk. § 93.
[m] 2 Inst. 713.
[n] 2 Inst. 719.
[o] 'The statute 2 P. & M. c. 7, which also related to the sale of horses, was repealed by the statute 19 & 20 Vict. c. 64.'
[p] Ff. 21, 2, 1.

from the seller, if he sells them *as his own* and the title proves deficient, without any express warranty for that purpose.[q] But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise and has used any art to disguise them, or unless they turn out to be different from what he represented to the buyer.[r]

2. Bailment.

2. Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanlike manner.[s] If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay or carry them to the person appointed.[t] If a horse, or other goods, be delivered to an [452] innkeeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house.[u] If a man takes in a horse or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner.[v] If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledger performs his part by redeeming them in due time:[w] for the due execution of which contract many useful regulations are made by the statutes '39 & 40 Geo. III. c. 99, and 9 and 10 Vict. c. 98, 19 & 20 Vict. c. 27.' And so, if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a friend delivers anything to his friend to

[q] Cro. Jac. 474; 1 Roll. Abr. 90; *Morley* v. *Attenborough*, 3 Ex. 500.

[r] See vol. iii. p. 173.

[s] 1 Vern. 268.

[t] 12 Mod. 482.

[u] Cro. Eliz. 622.

[v] Cro. Car. 271.

[w] Cro. Jac. 245; Yelv. 178.

keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise;[x] unless he expressly undertook[y] to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own.[z]

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution: the bailor having still left in him [453] the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person.[a] For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them, that he may always be ready to answer the call of the bailor.

Lien.

'Bailees have in some cases what is called a *lien* upon the goods committed to their care, which is the right of detaining some personal chattel from the owner thereof until a debt due to the person retaining has been satisfied. A lien may be either *particular* or *general;* the former is where the claim of retainer is made upon the goods themselves, in respect of which the debt arises, a claim which the law favours. The other, or general lien, is where goods are retained in respect

[x] Co. Litt. 89.
[y] 4 Rep. 84.
[z] *Coggs* v. *Bernard*, 1 Smith's L.C. 147.
[a] 13 Rep. 69.

of a general balance of account, which is less favoured. Thus a trainer who has a horse delivered to him to train, has a lien for his charges of keep and training; and in general, when the goods are delivered to a person to be improved or altered in character, this right arises; as when cloth is delivered to a tailor to convert into clothes; or corn to a miller to be returned in the shape of flour. The right of lien may be regulated by special agreement, and then its operation will depend upon the particular terms of the contract; but in the absence of express contract, the law implies a lien wherever the usage of trade, or the previous dealings of the parties give ground for such an implication. Although, as has been said, *general* liens are not favoured by law, yet in some cases they have become allowed and established by usage, as in the case of attornies upon the title-deeds and documents of their clients; factors, warehousemen, and others, upon goods confided to them in the ordinary course of business; all of whom have a lien for the amount of the general balance due to them in their several capacities.'[b]

3. Hiring and borrowing.

3. Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period;

[b] Smith's Mercantile Law, 5th ed. Book iv. ch. 2.

on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price for which the horse was hired.[c]

[454] Interest of money.

There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiæ.* That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle,[d] that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence, the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law[e] has proscribed the taking any, the least increase for the loan of money as a mortal sin.

But, in answer to this, it was long ago observed, that the Mosaic precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger:[f] which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se;* since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only [455] for the purposes of exchange, yet the laws of any state may

[c] Yelv. 172; Cro. Jac. 236.
[d] Polit. l. 1, c. 10.
[e] Decretal. l. 5, tit. 19.
[f] Deut. xxiii. 20.

be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or, at least, the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards; but when men's minds began to be more enlarged; when true religion and real liberty revived, commerce grew again into credit, and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there is no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money; but a reasonable equivalent for the temporary inconvenience which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed, the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders; and those principally bad men, who will break through the law and take a profit, and then will endeavour to indemnify themselves from the danger of the penalty by making that profit exorbitant.

'But although the legitimacy of interest upon moderate and conscientious terms has long been recognised amongst us, it has, until quite recently, been believed desirable to regulate by law the rate at which it should be taken, and interest beyond this allowed limit has been stigmatised with the odious ap-

pellation of usury. It has been reserved for our own time to carry out a principle which political economists have preached for above a century, that of permitting the rate of interest to regulate itself according to the exigencies of the time and the nature of things.'

[456] 'For it is plain, that in the absence of any arbitrary enactment,' the exorbitance or moderation of interest, for money lent, depends upon two circumstances: the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate, therefore, of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be: but, where there is not enough circulating cash, or barely enough, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

[457] So also the hazard of an entire loss has its weight in the regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent.*, a man that has money by him will perhaps lend it upon good personal security at *five per cent.*; allowing

two for the hazard run; he will lend it upon landed security or mortgage at *four per cent.*, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent.*, the hazard being none at all.

'When the rate of interest is fixed by law, as it was in this country until quite recently,' the hazard may sometimes be greater than the interest allowed will compensate. This has given rise to the practice of 1. Bottomry, or *respondentia.* 2. Policies of insurance. 3. Annuities upon lives.

Bottomry.

And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment. In which case, it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender.[g] [458] And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who, therefore, in this case is said to take up money at *respondentia.* These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1000*l.*, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed:[h] which kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima.*[i]

Respondentia.

[g] Moll. de Jur. Mar. 361; Bacon's Essays, c. 41; Cro. Jac. 208; Bynkersh. Quaest. Jur. Privat. l. 3, c. 16.

[h] 1 Sid. 27.

[i] Moll. de Jur. Mar. 361; Malyne, Lex Mercat. b. c. 31.

But, as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37, that all monies lent on bottomry, or at *respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandize; that the lender shall have the benefit of salvage;[j] and that if the borrower has not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as has not been laid out, with legal interest and all other charges, though the ship and merchandize be totally lost.

Insurance.

Secondly, a policy of *insurance* is a contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent.;* here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now, this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100*l.* at the rate of *eight* [459] *per cent.* For, by a loan, I should be immediately out of possession of my money, the inconvenience of which we have supposed equal to *three per cent.;* if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.*, which is the ordinary interest:

Life insurance.

[j] See vol. i. p. 289.

but there is also a special hazard in this case; for if Sempronius dies within the year, Titius most lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and, therefore, that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, 'we will suppose,' will not permit to be taken: Sempronius, therefore, gives Titius, the lender, only 5*l.*, the legal interest, but applies to Gaius, an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner might any extraordinary or particular hazard be provided against, which the rate of interest, 'when fixed by law, would' not reach; that having been calculated to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48, that no insurance shall be made on lives, or on any other event, wherein the party insured has no interest; that in all policies the name of such interested party shall be inserted; and nothing more shall be recovered thereon than the amount of the interest of the insured.[k] [460]

Marine insurance.

This does not, however, extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances 'has become an important branch of commercial jurisprudence, but is too varied and special in its character to be compendiously stated' in these elementary institutes. Thus much, however, may be said; that, these insurances being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and Acts of Parliament. But, as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest*, a species of gaming without any advantage to

k 'A father has not, in general, an insurable interest in the life of his child; *Halford* v. *Kymer*, 10 B. & C. 724; (*Reed* v. *Royal Exchange Comp.* Peake, Add. C. 70); but a wife has in the life of her husband.'

commerce, and denominated *wagering* policies: it is, therefore, enacted by the statute 19 Geo. II. c. 37, that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, all which had the same pernicious tendency, shall be totally null and void (except upon privateers, or upon ships or merchandize from the Spanish and Portuguese dominions, for reasons sufficiently obvious;[1] and that no reassurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead: and lastly, that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the borrower shall (in case [461] of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond.

Life annuities.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arose usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended together, constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bonâ fide* (and not colourably) put in jeopardy, no inequality of price, even while the usury laws existed, would make it an usurious bargain; though, under some circumstances of imposition, it might, and still may, be relieved against in equity. To throw, however, some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute

[1] See per Buller, J., *Andree* v. *Fletcher*, 2 T. R. 164.

17 Geo. III. c. 26, directed that, upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee simple or stock in the public funds) the true consideration, which was to be in money only, should be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestui que trusts*, *cestui que vies*, and witnesses, and of the consideration money, should, within twenty days after its execution, be enrolled in the Court of Chancery; else the security should be null and void; and in case of collusive practices respecting the consideration, the court, in which any action was brought or judgment obtained upon such collusive security, might order the same to be cancelled, and the judgment (if any) to be vacated. All contracts for the purchase of annuities from infants were declared utterly void, and incapable of confirmation after such infants arrived to the age of maturity. 'This act was repealed by the statute 53 Geo. III. c. 141, which enacted that within thirty days after the execution of any assurance creating an annuity or rent-charge for life, or years determinable upon lives, a memorial thereof should be enrolled in the Court of Chancery, and re-enacted the provisions with regard to collusion, consideration, and contracts with infants. But this statute, and two explanatory acts, 3 Geo. IV. c. 92, and 7 Geo. IV. c. 75, have now been repealed by the statute 17 & 18 Vict. c. 90, and the grantors and grantees of annuities are now left free to make their own bargains, without any restriction, or the necessity of complying with any regulations whatsoever, subject only to the general laws which regulate other species of contracts.'[m] But to return to the doctrine of common interest on loans:

[462]

Upon the two principles of inconvenience and hazard, compared together, different nations have, at different times, established different rates of interest. The Romans, at one time allowed *centesimæ*, *one per cent.* monthly, or *twelve per cent. per annum*, to be taken for common loans; but Justi-

[m] 'Purchasers and mortgagees of real property and creditors are protected against life annuities or rent-charges, granted by the owners of real estate, by the statute 18 Vic. c. 15, s. 12, which enacts, that no such annuity or rent-charge shall affect lands, unless a memorial of it be left with the senior master of the Common Pleas, by whom it is to be registered in a register kept by him for the purpose, which is open to the inspection of everybody.'

nian[n] reduced it to *trientes*, or one-third of the *as* or *centesimæ*, that is, *four per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. So, too, [463] Grotius informs us,[o] that, in Holland, the rate of interest was then eight per cent. in common loans, but twelve to merchants. And Lord Bacon was desirous of introducing a similar policy in England;[p] but 'his views found no favour with our legislators, and until quite recently,' one standard was established for all alike, where the pledge or security itself was not put in jeopardy, lest, it was said, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury; specific hazards were left to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. As to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9, confined interest to ten per cent., and so did the statute 13 Eliz. c. 8. But, as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so, under her successor, the statute 21 Jac. I. c. 17, reduced it to eight per cent.; as did the statute 12 Car. II. c. 13, to six: and, by the statute 12 Ann. st. 2, c. 16, it was brought down to five per cent. yearly, which 'until lately' was the extremity of legal interest that could be taken. Yet if a contract which carried interest were made in a foreign country, our courts were wont to direct the payment of interest according to the law of that [464] country in which the contract was made.[q] Thus, 'under the old system of things,' Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve per cent.; for the moderation or exorbitance of interest depending upon local circumstances, the refusal to enforce such contracts would have put a stop to all foreign trade. The statute 14 Geo. III. c. 79, also made all mortgages and other securities upon estates, or other property in Ireland, or the plantations, bearing interest not exceeding six per cent. legal; though executed in the kingdom of Great

[n] Cod. 4, 32, 26; Nov. 33, 34, 35.

[o] De Jur. B. & P. 2, 12, 22.

[p] Essays, c. 41.

[q] 1 Equ. Cas. Abr. 289; 1 P. Wms. 395. Pardessus, Droit Commercial, p. 7, t. vii. c. 2. *Gibbs* v. *Fremont*, 9 Ex. 25.

Britain: unless the money lent should be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower was to forfeit treble the sum so borrowed. 'By the statute 3 & 4 Will. IV. c. 98, some relaxation of the usury laws was made in favour of trade, and it was enacted, that no person taking more than the rate of legal interest for the loan of money on any bill or note, not having more than three months to run, should be subject to any penalty or forfeiture. Shortly afterwards the statute 5 & 6 Will. IV. c. 41, enacted that bills or other securities should not be totally void because a higher rate of interest than was allowed by the statute 12 Ann. st. 2, c. 16, had been received thereon. The statute 1 Vict. c. 80, next enacted, that bills of exchange payable at or within twelve months, should not for a limited time be liable to the laws for the prevention of usury, and this statute was followed by six others, extending from time to time the application of the original enactment. The statute 2 & 3 Vict. c. 37, enacted that no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of 10*l.*, should, by reason of any interest taken thereon or secured thereby, or any agreement to buy or receive or allow interest in discounting, negotiating, or transferring any such bill or note, be void, nor any person so lending be liable to the penalties of the usury laws; but it was provided that this relaxation should not extend to the loan or forbearance of any money on the security of lands. The public mind having thus slowly advanced in the direction of the policy advocated by Bacon above two centuries ago, at length became prepared for a still wider measure, and the statute 17 & 18 Vict. c. 90, after laconically reciting in the preamble, that "it is expedient to repeal the laws at present in force relating to usury," proceeds to repeal wholly, or in part, eleven English, five Scotch, and four Irish Acts, on which the whole penalties of usury previously rested:[r] among these Acts are included those relating to annuity transac-

[r] 'By the stat. 13 Geo. III. c. 63, s. 30, British subjects in the East Indies are still prohibited from taking more than 12 per cent.'

tions. The natural laws which regulate the terms on which money can be borrowed are therefore now left to operate freely, and borrowers and lenders are amenable to no other rules than those which govern contracts in general. The Act, however, does not affect the rights, remedies, or liabilities of any person in respect of anything done previously to its passing.'

Of debts.

4. The last species of contracts, which I have to mention, is that of *debt;* whereby a *chose* in action or other right to a certain sum of money, is mutually acquired and lost. This may be the counterpart of, and arise from, any of the other species of contracts. As in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; [465] being usually divided into debts of *record,* debts by *specialty,* and debts by *simple* contract.

Debts of record.

A debt of *record* is a sum of money which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature.[s]

Upon recognizance.

Debts upon recognizance are also a sum of money, recognized or acknowledged to be due to the Crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the

[s] The effects of a judgment are stated in vol. iii. p. 428.

appearance of the party, his good behaviour, or the like; and these (together with statutes-merchant and statutes-staple, &c.) 'now almost unknown in practice,' if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, viz., debts of record; since the contract on which they are founded is witnessed by the highest kind of evidence, viz., by matter of record.

Debts by specialty.

Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due, by deed or instrument under seal. Such as, by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth chapter of the present book; and then showed that it is a creation or acknowledgment of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

Debts by simple contract.

[466]

Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these Commentaries, where the breach of such contracts will be considered. I shall only observe at present, that, by the statute (29 Car. II. c. 3) no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to

be performed within one year from the making; unless the agreement, or some memorandum thereof, be in writing, and signed by the party himself, or by his authority: 'which enactments of the Statute of Frauds are extended by the statute 9 Geo. IV. c. 14, generally called Lord Tenterden's Act; which provides that no action shall be maintained, whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith; and that no action shall be brought, whereby to charge any person by reason of any representation given relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money, or goods, unless such representation be made in writing, signed by the party to be charged therewith.' [t]

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

Bills of exchange. A bill *of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in England, 1000*l.*, now if C. be going from England to Jamaica, he may pay B. this 1000*l.*, and take a bill of exchange drawn by B. in England upon A. in Jamaica, and receive it when he comes thither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money in paper credit, without danger of robbery or loss. This [467] method is said to have been brought into general use by the

[t] *Tatton* v. *Wade*, 11 Ex.

Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into these countries in which they had chosen to reside. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290;[u] and in 1236 the use of paper credit was introduced into the Mogul empire in China.[v] In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee;* and the third person, or negotiator, to whom it is payable (whether specially named, or the *bearer* generally) is called the *payee.*

Cheques.

'A cheque is a bill of exchange addressed to a banker, and payable to a person named, or *the bearer*. Such a cheque is, from the promise implied from the banking contract, binding on the banker having assets of the drawer, without acceptance,[w] and if he does not pay it, he is liable to an action by the drawer.'[x]

Foreign and inland bills.

Bills of exchange are either *foreign* or *inland; foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versâ;* and *inland*, when both the drawer and the drawee reside within the kingdom.[y] Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now, by two statutes, the one 9 & 10 Will. III. c. 17, the other 3 & 4 Ann. c. 9, inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such,[z] being by those statutes expressly enacted

[u] 2 Carte, Hist. Engl. 203, 206.

[v] Mod. Un. Hist. iv. 499.

[w] *Marzetti* v. *Williams*, 1 B. & Ad. 415.

[x] '*Rollin* v. *Steward*, 14 C. B. 595. Cheques payable to *bearer*, on *demand*, and drawn on a banker within fifteen miles of the place of issue, are exempt from stamp duty. Such instruments may be made payable to order, and issued anywhere, if they bear the proper stamp. (17 & 18 Vict. c. 83.)

[y] 'That is, Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, &c. (19 & 20 Vict. c. 97, s. 7.) Formerly a bill drawn in one of the three kingdoms, and payable in another, was a foreign bill.' (*Mahoney* v. *Ashlin*, 2 B. & Ad. 478.)

[z] 1 Roll. Abr. 6.

with regard to the other. So that now there is not in law any manner of difference between them,[a] 'except that inland bills do not require to be *protested*, as is the case with foreign bills.'[b]

Promissory notes.

Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large.[c] These also, by the same statute 3 & 4 Ann. c. 9, are made assignable and indorsable in like manner as bills of exchange. But, by statute '48 Geo. III. c. 88,' all promissory or other notes, [468] bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such, they being deemed prejudicial to trade and public credit. And by 17 Geo. III. c. 30, 'made perpetual by 27 Geo. III. c. 16,' all such notes, bills, draughts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities;[d] the omission of any one of which vacates the security, and is penal to him that utters it.

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, viz., that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the *value* thereof has been *received* by the drawer,[e] in order to show the consideration upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; con-

[a] 'The stamps required for bills of exchange, which have varied in amount from time to time, are now regulated by the statute 17 & 18 Vict. c. 83.'

[b] *Orr* v. *Maginnis*, 7 East, 358; *Windle* v. *Andrews*, 2 B. & Al. 696.

[c] 'A *bank-note* is a promissory note made by a banker.'

[d] 'The draft must state the name and abode of the payee, be attested by a subscribing witness, bear date at or before the time of issue, and be made payable within twenty-one days after date, but not to bearer on demand. Such a draft also is not negotiable after the day of payment.'

[e] Stra. 1212.

trary to the general rule of the common law, that no *chose* in action is assignable; which assignment is the life of paper credit. It may, therefore, be of some use to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

Assignment of bills.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may, by indorsement, or writing his name *in dorso*, or on the back of it, 'and delivery,'[f] assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note 'or cheque,' payable to A. or *bearer*, is negotiable without any indorsement,[g] and payment thereof may be demanded by any bearer of it.[h] But, in case of a bill of exchange, 'if it be payable at some time after sight,' the payee, or the indorsee (whether it be a general or particular indorsement), is to go to the drawee, and offer his bill for acceptance, which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. 'If the bill be payable at some certain time, presentation for acceptance is not essential.' If the drawee accepts the bill, 'which must in all cases be,' in writing,[i] he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may, 'and in the case of a foreign bill ought to,' protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if

[469]

Acceptance.

Protest.

[f] *Bromage* v. *Lloyd*, 1 Ex. 32.

[g] 2 Show. 235; *Grant* v. *Vaughan*, 3 Burr. 1516.

[h] 'But drafts on a banker, payable to bearer or order on demand, crossed with a banker's name or with the words "and company," in full or abbreviated, are only payable to or through a banker. *Carlon* v. *Ireland*, 5 El. & Bl. 19 & 20 Vict. c. 25.'

[i] 'Formerly the acceptance might be *verbal*. (Stra. 1000.) The statute 1 & 2 Geo. IV. c. 78, required that in *inland* bills it should be *in writing;* and now, no acceptance of any bill, whether inland or foreign, after 31st Dec. 1856, shall charge any person unless *in writing*. The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97.'

no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must immediately be given to the drawer, 'and indorsers. An inland bill need not be protested, but notice of its non-acceptance must be at once given.'

But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace),[j] the payee or indorsee is then, 'in the case of a foreign bill,' to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. 'A protest for non-payment is not required in the case of an inland bill, but notice of dishonour must be given immediately to the drawer and indorsers, in order to preserve the holder's remedy against them.' And the drawer on such protest 'being produced in the case of foreign bills, or on demand in the case of inland bills,' is bound to make good to the payee, or indorsee, not only the amount of the said bill, but also interest and all charges,[k] to be computed from the time of making such protest. But if no protest be made or notified, 'or notice of dishonour be given,' to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be; for though, when one [470] draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof, for otherwise the law will imply it paid; since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee.[l]

[j] If the third day of grace falls on a Sunday, Good Friday, or Christmas-day, or on a day of fast or thanksgiving appointed by royal proclamation, the bill or note is payable on the day preceding. (39 & 40 Geo. III. c. 42; 7 & 8 Geo. IV. c. 15.)

[k] See, as to charges, the Bills of Exchange Act, 1855, s. 6.

[l] Salk. 127.

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or, if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction, and so upwards. But the first indorser has nobody to resort to, but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the maker, the several indorsees of a promissory note have the same remedy, as upon bills of exchange against the prior indorsers.

'The holder of a dishonoured bill or note may bring separate actions against the acceptor, drawer, and all the indorsers at the same time. Although, however, he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill; but he may sue out execution against all the rest for the costs of their respective actions. And these instruments are, for the benefit of trade and commerce, so highly favoured by the law, that a special proceeding for recovering the amount thereof, which is at once expeditious and inexpensive, has been provided, as shall be more fully explained in the third volume of these Commentaries.'

CHAPTER XXXI.

OF TITLE BY BANKRUPTCY 'AND INSOLVENCY.'

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. Title by bankruptcy.

X. Bankruptcy; a title which we before lightly touched upon, so far as it related to the transfer of the real estate of the bankrupt. At present, we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us, therefore, first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* in a bankruptcy: and 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. Who may become a bankrupt.

1. Who may become a bankrupt. A bankrupt was before defined to be "a trader, who secretes himself, or does certain other acts, 'with intent to defeat or delay' his creditors." He was formerly considered merely in the light of a criminal or offender;[a] and in this spirit we are told by Sir Edward Coke,[b] that we have fetched as well the name, as the wickedness of bankrupts from foreign nations.[c] But at present the

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[a] Stat. 34 & 35 Hen. VIII. c. 4; 1 Jac. I. c. 15, § 17.

[b] 4 Inst. 277.

[c] The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman (Dufresne, I. 969), and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind (4 Inst. 277). And it is observable that the title of the first English statute concerning this offence, 34 Hen. VIII. c. 4, "against such persons as do make bankrupt," is a literal translation of the French idiom, *qui font banque route*.

laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankruptcy, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if, indeed, that law, *de debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted.[d] Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery *trans Tiberim*: an oppression, which produced so many popular insurrections, and secessions to the *Mons Sacer*. But I mean [473] the law of *cession*, introduced by the Christian emperors; whereby, if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto.*"[e] For, as the emperor justly observes,[f] "*inhumanum erat spoliatum fortunis suis in solidum damnari.*" Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted,[g] that, if the debtor by any unforeseen accident was reduced to low circumstances, and would

[d] Taylor, Comment. in L. decemviral; Bynkersh. Observ. Jur. I. 1; Heinecc. Antiq. III. 30, 4.

[e] Cod. 7, 71, per tot.

[f] Inst. 4, 6, 40.

[g] Nov. 135, c. 1.

swear that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law which, under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

The laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders:* since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as, by the loss of a ship in a tempest, the failure of brother traders, or by the nonpayment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his

Traders alone subject to the bankrupt laws.

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creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only a *trader*.

The first statute made concerning any English bankrupts, was 34 Hen. VIII. c. 4, when trade began first to be properly cultivated in England: which was almost totally altered by statute 13 Eliz. c. 7, whereby bankruptcy was confined to such persons only as *used the trade of merchandize*, in gross or by retail, by way of bargaining, exchange, rechange, bartering, chevisance,[h] or otherwise; or *sought their living by buying and selling*. And by statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener*, receiving other men's monies and estates into their trust and custody, were also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of the law, were extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, *bankers*, *brokers*, and *factors*, were declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners were included by the statute of James I., viz., for the relief of their creditors; whom they had otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But, by the Act 5 Geo. II. c. 30, s. 40, 'it was declared that' no *farmer*, *grazier*, or *drover* (as such), should be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them, above all others, for the payment of their reserved rents; wherefore, also, upon a similar reason, a *receiver of the taxes* 'was declared by the same Act incapable' (as such) of being a bankrupt; lest the Crown should be defeated of those extensive remedies against its

The first Bankrupt Act, 34 Hen. VIII., c. 4.

Stat. 21 Jac. I., c. 19.

[h] That is, making contracts. (Dufresne, II. 569.)

debtors, which are put into its hands by the prerogative. 'But all these statutes have been superseded by the Bankrupt Law Consolidation Act, 1849, which defines the persons who are to be deemed traders, and as such liable to the bankrupt laws. These are, as stated generally, all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods and commodities. The statute specifies a great many trading occupations,[i] which may not seem at first sight to come within either of these categories, and it extends not only to natural-born subjects, but also to aliens and denizens.[j] But farmers, graziers, common labourers, or workmen for hire, receivers-general of the taxes, and members of or subscribers to any incorporated commercial or trading company established by charter or Act of Parliament, are not, *as such*, to be deemed traders liable to become bankrupt.'

Petitioning creditor's debt.

By the same statute, 'in order to found a petition of adjudication of bankruptcy, there must be a debt either of some one creditor, or of two or more persons who are partners, amounting to 50*l.* or upwards, or debts of two creditors amounting together to 70*l.* or upwards, or of three or more creditors amounting to 100*l.* or upwards.' For the law does not look upon persons whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statute themselves, or to entitle the creditors for the benefit of public commerce, to demand the distribution of their effects; and, 'as we shall see afterwards, a simple and inexpensive method has been provided, by what are called the "Protection Acts," whereby traders owing less than 300*l.* may obtain protection from process, on surrendering all their property for distribution among their creditors.'

[i] Alum-makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffeehouses, limeburners, livery-stable keepers, market-gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight or other matters against perils of the sea.

[j] See the Bankrupt Law Consolidation Act, 1849, s. 277.

'The earlier statutes were less precise in their language as to the persons who were to be considered liable as traders to the operation of the bankrupt laws; but,' in the interpretation of these statutes it was held, that buying only or selling only would not qualify a man to be a bankrupt, but he must have been both buying and selling, and also getting a livelihood by it; as by exercising the calling of a merchant, a grocer, a mercer, or in one general word, a *chapman*, who is one that buys and sells anything. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit for the stock in trade is not necessary to be had) would make a man a bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour.[k] 'Under these older statutes, too, it was held that an' innkeeper could not, as such, be a bankrupt:[l] his gain or livelihood not arising from buying and selling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance, and the like: and though he might buy corn and victuals, to sell again at a profit, 'he was held to be no more' a trader, than a schoolmaster or other person is, that keeps a boarding-house, and makes considerable gains by buying and selling what he spends in the house, and such a one is clearly not within the statutes.[m] But persons buying goods, and making them up into saleable commodities, as shoemakers, smiths, and the like; though part of the gain is by bodily labour, and not by buying and selling, 'fell' within the 'early' statutes of bankrupts[n] 'by legal construction, as they do by express words under the recent Act, on the ground that' the labour is only in melioration of the commodity, and rendering it more fit for sale.

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One single act of buying and selling will not make a man a trader; but a repeated practice and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt, they not being 'goods or commodities' within the intent of the statute, by which a profit may be fairly made.[o] Neither will buying and selling under particular restraints, or for particular purposes; as, if a commissioner of the navy uses to buy victuals for the fleet, and

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[k] Cro. Car. 31.
[l] Cro. Car. 549; Skinn. 291.
[m] Skinn. 292; 3 Mod. 330; *Valentine* v. *Vaughan*, Peake, N. P. 76.
[n] Cro. Car. 31; Skinn. 292.
[o] 2 P. Wms. 308.

disposes of the surplus and refuse, he is not thereby made a trader within the statutes.[p] An infant, though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessaries: and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts which he is not liable at law to pay.[q] But a feme-covert in London, being a sole trader according the custom, is liable to the bankrupt laws.[r]

2. How a man may become a bankrupt.

2. Having thus considered who may, and who may not be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. A bankrupt is "a trader, who secretes himself, or does certain other acts, 'with intent to defeat or delay' his creditors." We have hitherto been employed in explaining the former part of this description, "a trader;" let us now attend to the latter, "who secretes himself, or does certain other acts 'with intent to defeat or delay' his creditors." And, in general, whenever such a trader as is before described, has endeavoured to avoid his creditors, or evade their just demands, this has been declared by the legislature to be an act of bankruptcy, upon which 'an adjudication of bankruptcy may be made.' For, in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible; that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the 'Bankrupt Law Consolidation Act, 1849, by which all the previous statutes on this subject are superseded,' and the resolutions formed by the courts thereon. 'The ordinary acts of bankruptcy, on which [478] an adjudication may be made, are,' 1. Departing the realm, whereby a man withdraws himself from the jurisdiction and

[p] 1 Salk. 110; Skinn. 292.
[q] Lord Raym. 443; *Belton* v. *Hodges*, 9 Bing. 365.
[r] *La Vie* v. *Philips*, 3 Burr. 1776.

coercion of the law, with intent 'to defeat and delay' his creditors. 2. 'Being out of the realm, remaining abroad, with a similar object.' 3. Departing from his own 'dwelling'-house, 'or otherwise absenting himself,' with intent to secrete himself, and avoid his creditors. 4. 'Beginning to keep' his house privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause, which is likewise construed to be an intention to 'defeat and delay' his creditors, by avoiding the process of the law. 5. Suffering himself to be arrested, or 'taken in execution for any debt not due, or yielding himself to prison, or suffering himself to be outlawed, or procuring himself to be arrested or taken in execution, with intent to defeat or delay his creditors.' 6. Procuring his goods, money, or chattels, and effects, to be attached, sequestered, 'or taken in execution;' which is another plain and direct endeavour to disappoint his creditors of their security. 7. Making, 'or causing to be made, either within the realm or elsewhere,' any fraudulent conveyance of his lands or tenements, 'or making, or causing to be made, any fraudulent surrender of any of his copyhold lands or tenements; or making, or causing to be made, any fraudulent gift, delivery, or transfer of any of his goods or chattels; all of' which are acts of the same suspicious nature with the last. 'But an assignment by deed of *all* the trader's estate and effects to trustees *for the benefit of all his creditors*, is not an act of bankruptcy (unless a petition for adjudication of bankruptcy be filed within three months from the execution of such assignment), provided the assignment be executed by every such trustee within fifteen days after the execution thereof by the trader; and the execution by all parties be attested by an attorney or solicitor; and due notice thereof, in such manner as the statute prescribes, be given in the Gazette and newspapers.' 8. Lying in prison for 'twenty-one days' upon arrest or other detention for debt, 'after arrest or committal to prison for debt, or attachment for nonpayment of money; or lying in prison for twenty-one days upon any detainer for debt, after having been committed for any other cause.'[s] For, the inability to procure bail, argues a strong deficiency in his credit, owing either to his suspected poverty or ill character; and his neglect to do it, if

[s] The Bankrupt Law Consolidation Act, 1849, s. 69.

able, can arise only from a fraudulent intention; in either of which cases, it is high time for his creditors to look to themselves, and compel a distribution of his effects. [479] 9. Escaping from prison 'or custody, after having been arrested, committed, or detained for debt.' For no man would break prison, that was able and desirous to procure bail; which brings it within the reason of the last case.[t] 10. 'Filing in the Court of Bankruptcy a declaration of inability to meet his engagements, is, in a *trader*, an act of bankruptcy, if a petition for adjudication be filed within two months afterwards.[u] 11. Paying money to a creditor petitioning for an adjudication, or giving him satisfaction or security for his debt or any part thereof, after his petition has been filed,[v] being an attempt on his part to gain, and on that of the debtor to give, an advantage over other creditors, which the policy of the bankrupt laws will not permit, is an act of bankruptcy.' 12. Neglecting to pay, 'secure, or compound a debt, or money demand, for which judgment has been obtained, within seven days after a notice in writing, requiring immediate payment of such judgment debt; or to pay a sum of money for which a decree or order has been made in a court of equity, on a peremptory day of payment fixed by such court, after having been personally served with a copy of the order fixing the peremptory day for such payment,[w] seven days before such day, are either of them acts of bankruptcy. 13. Filing a petition in the Court for the Relief of Insolvent Debtors in England, or in India; or for an arrangement with creditors under the powers and provisions for that purpose, contained in the Bankrupt Law Consolidation Act, are, either of them, in certain cases, acts of bankruptcy.[x] 14. Failing, after service of the particulars of a creditor's debt or claim, and a notice requiring immediate payment, and a summons from the Court of Bankruptcy, to give an admission to the creditor, or to appear in court either to admit or deny the alleged debt or claim, and, admitting it, to give a cognovit, or denying it, to give bail if it be required, to pay the sum to be recovered in an action, may also afford ground for an adjudication.[y] Finally, 15. A trader having privilege of parliament, failing to pay, secure, or compound a debt, within one

[t] Section 69.
[u] Section 70.
[v] Section 71.
[w] Section 72.
[x] Sections 74, 75, 76.
[y] Sections 78-84.

month after personal service of a writ of summons (which is, in a particular form, given by the statute), or to give bond, with two sureties, to pay such sum as shall be recovered in the action, and to enter an appearance thereto, thereby commits an act of bankruptcy from the time of the service of the summons.'[z]

These are the several acts of bankruptcy expressly defined by the 'Bankrupt Law Consolidation Act.' Being so numerous, and the whole law of bankruptcy being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication. And therefore, Sir John Holt held,[a] that a man's removing his goods privately, to prevent their being seized in execution, was no act of bankruptcy. For, the statutes 'then in force,' mentioned only fraudulent gifts to third persons, and procuring them to be seized by sham process in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, was adjudged not to be an act of bankruptcy. So, also, it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the 'earlier' statutes, 'nor, as we have seen, is it included among the acts pointed out by the recent statute;' and there may be good reasons for his so doing, as suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy;[b] but if he goes to prison, and lies there 'twenty-one days,' then, and not before, is he become a bankrupt.

We have seen *who* may be a bankrupt, and what *acts* will make him so. Let us next consider,

3. The *proceedings* in bankruptcy, so far as they affect the bankrupt himself. 'The first proceeding in court in any case, is' the filing of the petition for adjudication, on which the commissioner hears the evidence, and either adjudicates the trader to be a bankrupt, or dismisses the petition. The next proceeding, in case an adjudication is made, is the surrender of the bankrupt, and his examination; the appointment of

3. The proceedings in a bankruptcy.

[z] Section 77. [a] Lord Raym. 725. [b] 7 Mod. 139.

creditors' assignees, and the proof of debts against the estate. The last proceeding is the application of the bankrupt for his certificate, and the opposition to it, if any: before or after which, the commissioner may order an audit and dividends until the whole of the assets are distributed. Of these various stages in a bankruptcy, each in its proper order.'

[480] 'Under the old statutes, the first proceeding in a bankruptcy was a *petition* to the lord chancellor by one or more creditors, whose' debts must have been proved by *affidavit:* upon which he granted a *commission* to such discreet persons as to him seemed good, who were then styled Commissioners of Bankrupt; 'and who afterwards proceeded to take proof of the trading, to adjudge the trader a bankrupt, and appoint meetings for the election of assignees, after which the bankrupt's estate was divided among the creditors, who had proved their debts, and the bankrupt discharged. The proceedings of these commissioners were found in time to be dilatory, expensive, and unsatisfactory; and accordingly, by the statute 1 & 2 Will. IV. c. 50, the Court of Bankruptcy was established in London, and permanent commissioners appointed for the country, whose proceedings were subject to the review of that court. These country commissioners were, however, superseded, in consequence of the statute 5 & 6 Vict. c. 122, in virtue of which district courts were established throughout England, each with original jurisdiction in all bankruptcies arising within the district assigned to it. For the proceeding by *commission* was substituted a *fiat*, which was an authority to the petitioner (granted by the lord chancellor on an affidavit of debt as formerly) to prosecute his complaint in the Court of Bankruptcy; which *fiat*, as soon as it was recorded in the Court of Bankruptcy, any commissioner might proceed to carry into execution.'

'The proceeding by petition and *fiat* has been abolished, and the Court of Bankruptcy itself is now directly appealed to by a petition for adjudication of bankruptcy, in the manner prescribed by the Bankrupt Law Consolidation Act, 1849; by which, as modified by the statute 17 & 18 Vict. c. 119, all the subsequent proceedings in a bankruptcy are likewise regulated.'

Petition for adjudication.

'The petition for adjudication of bankruptcy must be filed and prosecuted in the court of the district in which the

trader has resided or carried on business for the previous six months; but in certain cases, as when the trader has had extensive transactions in more than one district, it may be prosecuted in London, or some other district, if so ordered by the chief commissioner in London. And an adjudication may be made on the petition either of a creditor or creditors, or of the trader himself. If the petition is by a creditor, his debt must, as we have already had occasion to remark, amount to fifty pounds; if by two creditors their debts must amount to seventy pounds; if by three or more creditors their debts must amount to one hundred pounds; and the debt must in each case be a *debt*, strictly so called, and not a claim founding in damages;[c] and it must have subsisted while the debtor was a *trader*.[d] If the trader himself petition, he must, before adjudication, prove that his available estate is sufficient to produce one hundred and fifty pounds at the least, clear of all charges.'[e]

'When a petition has been filed, the commissioner has power to issue an immediate warrant for the arrest of the debtor, if necessary, and for the seizure of all his property. Under the warrant, which is directed to the messenger of the court, that officer has authority to take and detain the debtor, and to seize all his books, papers, moneys, and securities, wheresoever they may be found.'

'On application to the commissioner for adjudication, he is' to receive proof of 'the creditor's *debt*, and of the debtor's' being a *trader*, and of his having committed some act of bankruptcy '*within twelve months;*' and the commissioner then proceeds to adjudicate the trader a bankrupt, and to appoint an *official assignee* to act in the bankruptcy, whose duty it is, immediately on his appointment, to take possession of all the bankrupt's property. Of this adjudication of bankruptcy against him, notice is given to the bankrupt (in cases where he is not the petitioner), either by service of a copy thereof on him personally or by leaving the same at his last known place of abode, so that he may if so advised dispute the validity of the adjudication, which he is at liberty to do within seven days, giving two days' notice in writing of his intention to the petitioning creditor or his solicitor, and to the registrar of the

Notice of adjudication.

[c] Ex p. *Broadhurst*, 2 De G. M. & G. 953.

[d] Ex p. *Griffiths*, 3 De G. M. & G. 174.

[e] 17 & 18 Vict. c. 119, ss. 21, 22.

court, and stating therein which of the matters he intends to dispute, the trading, the petitioning creditor's debt, or the act or acts of bankruptcy.[f] If disputed, all these matters must be again proved before the commissioner, the attendance of all witnesses, and the production of all documents being enforced by summons and attachment if necessary. The adjudication is then either annulled or sustained. There is an appeal against the judgment of the commissioner to the Lords Justices of the Court of Appeal in Chancery, and from their judgment to the House of Lords.

Notices in the Gazette.

'If the adjudication is submitted to, or sustained, the commissioner causes notice thereof to be given' in the 'Gazette,' and at the same time appoints 'two public sittings of the court for the bankrupt to surrender and conform, and for the election of creditors' assignees. The bankrupt is at liberty, however, to surrender at any time before the time limited, by appearing in court and signing a memorandum to that effect, on which he obtains an order of protection from arrest at the suit of any creditor, until the next sitting of the court.'

'At the first of these sittings' an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be chosen by the major part in value of the creditors who shall then have proved their debts: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l*.

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'In the mean time, however, and immediately on the adjudication being made, the *official assignee* becomes the depository of all the bankrupt's property, and if the court so order he

[f] Although the bankrupt may not be able to show good cause for annulling the adjudication within the time limited, he is not yet foreclosed from adopting other proceedings for this purpose; for he is allowed (if within the United Kingdom) twenty-one days—if in any other part of Europe, three months—and if elsewhere abroad, twelve months, after the advertisement has been inserted, to commence any action, suit, or other proceeding to dispute or annul the adjudication; and the Isle of Man is not for this purpose within the United Kingdom (*Davison* v. *Farmer*, 20 L. J. 177 Ex.). The "other proceeding" just mentioned means an appeal to the Lords Justices, and not an application to the Commissioner in bankruptcy, his jurisdiction, to annul the adjudication, being limited to the time allowed the trader to apply to the court after the notice of the petition. (*Carter* v. *Dimmock*, 4 House of Lords' Cases, 337; *Emery*, (ex parte) 23 L. J. Rep. Bank. 33.)

may, before the creditor's assignees are chosen, sell or dispose of goods of a perishable nature, or other property the holding of which until the choice of assignees would prejudice the bankrupt's estate. The official assignee receives all rents, interest, proceeds of sales, or other monies which may accrue from the bankrupt's estate, and places them in the Bank of England. All books, papers, and accounts relating to the estate must be delivered up to him, on oath if required, and the bankrupt must attend him at all reasonable times, to assist in getting in and protecting the estate, for which attendance he is paid at the rate of five shillings a-day. The election of creditors' assignees being made, and the selection being ratified by the court, such appointment has the effect of vesting in these assignees, conjointly with the official assignee, all the bankrupt's estate and effects, to be by them held for the benefit of the creditors at large. To the assignees also pertains the duty of calling meetings, collecting debts, and acting generally for the benefit of the estate under the orders of the court; the official assignee, until assignees are chosen by the creditors, having been, as we have already seen, to all intents and purposes the sole assignee of the bankrupt's estate and effects.'

At the 'second of these sittings, at farthest,' which must be 'on a day not less than thirty and not exceeding sixty days from' the advertisement in the Gazette (unless the time be enlarged by the 'court,' the bankrupt, upon notice personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrest, 'unless he has been guilty of certain offences enumerated by the statute, which involve a refusal of protection:' and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony, 'and may be transported for life, or imprisoned for seven years.'

Examination of bankrupt.

When the bankrupt appears, the commissioner is to examine him touching all matters relating to his trade and effects. He may also summon before him, and examine the bankrupt's wife and any other person, 'supposed to have any of the bankrupt's property in his hands, or to be capable of giving information touching his affairs.' And in case any of them

shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioner may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioner specifying in his warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape or go out of prison, shall forfeit 500*l.* to the creditors.

[482] The bankrupt, upon his examination, 'which may be adjourned from time to time or *sine die*,' is bound upon pain of 'transportation for life (formerly the penalty was' death), to make a full discovery of all his estate and effects, as well in expectancy as in possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners (except the necessary apparel of himself, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 10*l.*, or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony, and ' be liable to transportation for life or not less than seven years, or imprisonment for any term not exceeding seven years. Under the rigorous enactment of the statute 21 Jac. I. c. 19, which was not repealed until the year 1816,' unless it appeared that his inability to pay his debts arose from some casual loss, he might, upon conviction by indictment of such misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off.

After 'forty-two days from the filing of the petition have' elapsed, any person voluntarily discovering any part of the bankrupt's estate, before unknown to the assignees, is entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees 'with the consent of the court' shall think proper. 'But any person' wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed.

Hitherto, everything is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigour and severity. For, if the bankrupt has made an ingenuous discovery (of the truth and sufficiency of which

there remains no reason to doubt), and has conformed in all points to the directions of the law, 'the court proceeds to appoint a public sitting for the allowance of the certificate of conformity. And unless any of the creditors succeed in showing a good cause to the contrary, the court certifies that the bankrupt has made a full discovery, and conformed in all respects. If, however, the bankrupt be proved to have destroyed or falsified books or entries, or to have been guilty of any manner of fraud in contracting debts, or to have given a fraudulent preference to any of his creditors, or concealed or made away with any of his property, or given fictitious accounts of his losses and expenses, or put his creditors to unnecessary expense by frivolous defences, or wilfully withheld the production of any book relating to his dealings, or have wilfully omitted to keep proper accounts of his trading, then the court may refuse, or suspend the certificate, or annex such conditions to it as the justice of the case may require. And if the bankrupt is shown to have lost 20*l.* in one day by gaming, or 200*l.* within the year next preceding the filing of the petition, or if within the same time he has lost 200*l.* by a time-bargain for the purchase or sale of stock, he is not entitled to a certificate, or if he obtains one it is void.'

Certificate of conformity.

'Three classes of certificates are given, the *first* where the bankruptcy is found to have arisen from unavoidable losses and misfortunes, the *second* when it has not *wholly* arisen from such causes, and the *third* when it has not arisen from such causes at all, which finding is in every case specified in the certificate. Notice of the allowance of the certificate, the time of suspension (if any), and the conditions of allowance (if any) is given by advertisement in the London Gazette, ten days or more before the time allowed by the statute for appealing against the granting of the certificate; and if no appeal be lodged, the court at the expiration of the time, on production of the Gazette containing the advertisement, delivers to the bankrupt the certificate of conformity.'

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When the certificate has been allowed, the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger

dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the court and assignees, to have a competent sum allowed him, not exceeding *three per cent.;* but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and sixpence, then *seven and a half per cent.;* and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.;* provided that such allowance do not, in the first case, exceed 300*l.*, in the second, 400*l.*, in the third, 500*l.*, 'and in the fourth, 600*l.*'[g]

Besides this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt, 'and from all claims and demands provable under the bankruptcy,' even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts: and, for that, among other purposes, all proceedings in bankruptcy are entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate, properly allowed, is sufficient evidence of all previous proceedings. Thus, the bankrupt becomes a clear man again: and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth, which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

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For no allowance or indemnity shall be given to a bankrupt, unless his certificate be duly allowed, as before mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by 'proceedings in bank-

[g] By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors (Ff. 42, 3, 4). But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself and family. *Si quid misericordiæ causâ ei fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cottidianis.* (Ff. 1, 6.)

ruptcy,' or have compounded with their creditors, or have 'taken the benefit of the Insolvent Debtors Acts, under the provisions of which, as we shall see afterwards,' all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath; in which case their perjury or fraud may be, as in case of bankrupts, punished with 'transportation or imprisonment.'

Thus much for the proceedings in a bankruptcy, so far as they affect the bankrupt himself personally. Let us next consider, [485]

4. Property of the bankrupt.

4. How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The 'transfer of' a *real* estate, in lands, tenements, and hereditaments, 'through the operation of' bankruptcy, 'has been mentioned' under its proper head in a former chapter. At present, therefore, we are only to consider the transfer of things *personal* by this operation of law.

By virtue of the statute, all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the assignees of the bankrupt, whether they be goods in actual *possession*, or debts, contracts, and other choses in *action:* and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broke open, in order to enter upon and seize the same. And when the assignees are chosen by the creditors, 'and approved by the court,' the property of every part of the estate is, 'by virtue of their appointment,' as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it.[h]

'Until the choice of the creditors' assignees, the official assignee is, as we have seen, the sole assignee of the bankrupt's estate and effects, and the whole property, real and personal, vests in him alone. Upon the appointment of the creditors' assignees, the property vests in them jointly with him, he alone having the receipt of the rents and profits of the real estate, and the possession of the personal estate; but he cannot interfere with the creditors' assignees in the sale of the

[h] 12 Mod. 324.

estate and effects. When the sale has taken place, the official assignee is the party to receive the proceeds, which he pays into the Bank of England to the credit of the accountant in bankruptcy.'

Assignees' title.

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. 'Moreover, if at the time of the bankruptcy the trader has in his possession, order, or disposition, by consent and permission of the true owner, any goods or chattels, of which he is thus the *reputed owner*, the court may order the same to be sold and disposed of for the benefit of the creditors.'[i] Therefore, it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be;[j] but that, if 'an adjudication of bankruptcy' is afterwards made, the 'adjudication' and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy.[k] Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not executed 'by seizure and sale'[l] of the bankrupt's effects till after the 'filing of the petition for adjudication,' it is void as against the assignees. But the Crown is not bound by this fictitious relation, nor is within the statutes of bankrupts;[m] for, if, after the act of bankruptcy committed, and before the transfer of his effects, an extent issues for the debt of the Crown, the goods are bound thereby.[n] In France, this doctrine of relation was formerly carried to a very great length; for there, every act of a mer-

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[i] 12 & 13 Vict. c. 106, s. 125. Questions frequently arise as to what goods or chattels were, or were not, "in the possession, order, and disposition" of the bankrupt with the consent and permission of the owner. (See *Heslop* v. *Baker*, 6 Ex. 740; 8 Ex. 411; *Graham* v. *Furber*, 14 C. B. 134.)

[j] Salk. 110.

[k] *Cooper* and another v. *Chitty and Blackiston*, 1 Burr. 20.

[l] *Cooper* v. *Hutton*, 6 Ex. 159.

[m] 1 Atk. 262.

[n] Viner, Abr. t. *Creditor and Bankrupt*, 104; *Reg.* v. *Edwards*, 9 Ex. 32, 628.

chant, for ten days *precedent* to the act of bankruptcy, was presumed to be fraudulent, and was therefore void.[o] But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by the statute, that no money paid by a bankrupt to a *bonâ fide* or real creditor, in a course of trade, even after an act of bankruptcy done 'previous to the filing of the petition, provided the creditor had no notice of the act of bankruptcy,' shall be liable to be refunded. 'And any dealings with or payments to him, under the same circumstances, shall be valid.[p] The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

The assignees may pursue, 'with the leave of the court,' any *legal* method of recovering this property so vested in them, and may commence 'an action at law,' or a suit in *equity*, 'and, with the consent of the creditors,' compound any debts owing to the bankrupt, and refer any matters to arbitration.

Dividend.

'The court may, whenever it shall think fit, appoint a sitting, after the last examination of the bankrupt (giving twenty-one days' notice thereof in the Gazette), to make a dividend of the estate got in. And 'at this sitting' the court shall direct a dividend to be made, at so much in the pound, 'of such part of the net produce of the bankrupt's estate as it thinks fit,' to all creditors who have proved their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe; for the 'adjudication' reaches only the equity of redemption. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment. 'A distress for rent made and levied after an act of bankruptcy, whether before or after the filing of the petition, is available only for one year's rent accrued prior to the date of the filing of the petition, and no more; but the landlord may come in as a creditor for the surplus of rent due, for

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[o] Sp. L. b. 29, c. 16.

[p] 12 & 13 Vict. c. 106, s. 133.

which the distress shall not be available.[q] Taxes assessed upon the bankrupt at the time of his bankruptcy up to the succeeding 5th day of April (not exceeding one whole year's assessment) must be first paid in full,[r] and if the bankrupt be an officer of a friendly society, the court may order the full payment of all monies due from him to the society, in priority to all other debts.'[s] But, otherwise, judgments and recognizances (both which are debts of record, and therefore at other times have a priority), and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next in order), these are all put on a level with debts by mere simple contract, and all paid *pari passu.* Nay, [488] so far is this matter carried, that, by the express provision of the statute, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest, allowing a discount or drawback in proportion.[t] And insurances, and obligations upon bottomry or *respondentia, bonâ fide* made by the bankrupt, though forfeited after the 'adjudication,' shall be looked upon in the same light as debts contracted before any act of bankruptcy.[u] 'Annuity creditors, sureties for the payment of annuities, creditors upon contingencies, which have not happened at the date of the petition, and creditors who have recovered judgments against the bankrupt in respect of their costs, although such costs have not been taxed at the time of the bankruptcy, are also admitted to prove according to the calculated value of their claims.[v] The clerks or servants of the bankrupt are also allowed three months' wages or salary, but not exceeding 30*l.* then due, and are admitted to prove for any sum due to them exceeding that amount.'[w]

Final dividend.

Within eighteen months after the 'filing of the petition,' a second and final dividend shall be made, unless all the effects were exhausted by the first.[x] And if any surplus remains, after selling his estates, and paying every creditor his full debt, it shall be restored to the bankrupt.[y] This is a case which sometimes happens to men in trade, who involuntarily,

[q] 12 & 13 Vict. c. 106, s. 129.
[r] Ibid. Sect. 166.
[s] Ibid. Sect. 167.
[t] Ibid. Sect. 172.
[u] Ibid. Sect. 174.
[v] 12 & 13 Vict. c. 106, ss. 175, 176, 177, 178, 181.
[w] Ibid. Sect. 168.
[x] Ibid. Sect. 188.
[y] Ibid. Sect. 197.

or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and 'file a petition,' the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon an offer of a composition made to the creditors, and accepted by nine-tenths in number and value of the creditors assembled at a meeting properly convened for the purpose, the adjudication may be annulled.[z] This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of filing the petition, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt, or his representatives.[a]

'The law allows a trader unable to meet his engagements to effect in some cases a private arrangement with his creditors, by which the publicity and annoyance consequent upon the ordinary proceedings in a bankruptcy may be in some degree avoided. On the petition of the debtor, stating his inability to meet his engagements, and showing the cause thereof, the court is empowered to grant protection from process, and to appoint certain private sittings, notice of which is given to the creditors by post. If a sufficient number of the creditors consent to the arrangement proposed by the debtor, it is carried into effect under the sanction of the court, the official assignee and another person to be appointed by the creditors, becoming the depositories of the debtor's effects. Under an arrangement thus effected, the debtor may obtain a protection certificate, having the same effect as a certificate in bankruptcy.'

'The proceedings hitherto detailed relate to the cases of individual traders, whether trading solely or in partnership with others; but they comprise no provisions suitable to the case of a trading corporation or chartered company becoming unable to meet its engagements.'

[z] 12 & 13 Vict. c. 106, s. 230.

[a] 12 & 13 Vict. c. 106, s. 197.

Joint Stock Companies.

'The statute 7 & 8 Vict. c. 111, however, enacts, that companies incorporated by charter or Act of Parliament, or privileged under any Act of Parliament, and also joint-stock companies registered under the statute 7 & 8 Vict. c. 110 (such companies being established for commercial purposes), shall be liable to become bankrupt in their corporate or collective capacity; and by the statute 7 & 8 Vict. c. 113, s. 48, banking companies consisting of more than seven partners are brought within the provisions of the former Act. Any creditor of the company to the amount required in other cases of bankruptcy, and whether a shareholder of the company or not, may take proceedings in bankruptcy against the company.'

'The *act of bankruptcy* on which a creditor may thus proceed, may be either the voluntary filing of a declaration of insolvency, by virtue of a resolution of the directors of the company, or the failure of the company to secure, compound, or satisfy a judgment debt, within fourteen days of a notice in writing being duly served on them; or disobedience to an order of a court of equity requiring the payment of money for a period of fourteen days; and if a creditor file an affidavit of his debt in one of the Superior courts, and issue a writ of summons, and the company within one calendar month after service of the writ, fail to compound or pay the claim, or to satisfy a judge of the court out of which the summons issues, that they intend to defend the action upon the merits, ad enter an appearance for that purpose, such company is deemed to have committed an act of bankruptcy.'

'Upon an adjudication being made against the company, the court may require the directors or other members thereof to prepare a balance-sheet and accounts, and to make oath of the truth of the same, and the same persons are under obligation to surrender, and submit to be examined upon oath as to the estate and effects of the company. They have, in return, the same protection from arrest and imprisonment as is afforded to ordinary bankrupts.'

'The Court of Bankruptcy has no jurisdiction to settle the rights and claims of the members of the company as between themselves, or to compel contribution amongst them, but it may direct the Court of Chancery to be petitioned for this purpose if necessary. Two statutes have been passed, usually called the Winding-up Acts (11 & 12 Vict. c. 45, and 12 &

13 Vict. c. 108), to provide a method of proceeding in such cases.'

'The recent Joint-Stock Companies Act, 19 & 20 Vict. c. 47 (which repeals the previous Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, and consolidates the law on this subject), contains provisions for the bankruptcy and winding-up of all joint-stock companies which come within its scope (banking and insurance companies are excluded from its operation). Companies registered under this Act with limited liability are placed, for the purposes of winding-up and bankruptcy, under the jurisdiction of the Court of Bankruptcy, but those with unlimited liability under that of the Court of Chancery itself. But when that court has made a decree for the winding-up of a company, it may hand over the subsequent proceedings to the Court of Bankruptcy.'

'When a company is unable to pay its debts, either a creditor or a person liable to contribute to the payment of the debts may petition for its winding-up. But upon any other ground of winding-up the petition can be only by a contributory.[b] A company is to be deemed unable to pay its debts whenever a creditor, to an amount exceeding 50*l*., having served a notice on the company at their registered office demanding payment, the company for three weeks neglects to secure or compound it to his satisfaction; or when an execution issued on a judgment, decree, or order of any court in favour of a creditor, is returned by the sheriff as unsatisfied.'

'If the court sees fit to make an order for winding-up, the assets of the company are to be immediately collected and applied in discharge of its liabilities, in a due course of administration.'

'For this purpose the court may summon before it all persons supposed capable of giving information as to the affairs of the company,[c] and examine them upon oath,[d] and has power to punish, as for a misdemeanor, any director, officer, or contributory guilty of any falsification of books, or other attempt to conceal the true state of the company's affairs.[e] The court may restrain proceedings in any action or suit

[b] 19 & 20 Vict. c. 47 s. 69.
[c] Ibid. Sect. 77.
[d] 19 & 20 Vict. c. 47, s. 78.
[e] Ibid. Sect. 79.

against the company, and appoint a receiver, and may require, by notice or advertisement, all creditors to present and prove their claims within a certain time, or be precluded from the benefit of the division of the company's estate.[f] The court may make such calls as it thinks necessary upon the contributories, according to their different liabilities,[g] and as soon as the creditors have been satisfied it may proceed to adjust the rights of the contributories amongst themselves.[h] For the purpose of conducting the proceedings, and assisting the court in the winding-up, persons are to be appointed, called "official liquidators,"[i] who will fill the place of the official and creditors' assignees in ordinary cases of bankruptcy. They are empowered to take into their custody all the property and effects of the company,[j] and may bring or defend any suit or action, carry on the business of the company, sell its property and effects, use the company's seal if necessary for deeds or receipts, refer disputes to arbitration, prove claims in bankruptcy, draw or accept bills, and do all other necessary acts for winding-up the company's affairs and distributing its assets.'[k]

'These provisions apply to all registered joint-stock companies, the enactments of the 7 & 8 Vict. c. 111, being now no longer applicable to such companies; but that statute still remains in force with respect to *banking* and *insurance* companies, and to companies incorporated or authorised to trade by Act of Parliament or royal charter, or letters patent.'

XI. *Title by Insolvency.*—'The position of those insolvent persons, who were not entitled to the benefit of the bankrupt laws, of which the provisions have been just detailed, was formerly one of great hardship. The law still recognizes the right of the judgment creditor to seize the person of the debtor, and to cause him to be detained in prison until he either satisfy the debt, or resort to the other means provided for obtaining his discharge, and until comparatively recent times the debtor might in many cases be detained for years in hopeless confinement. Acts of Parliament were occasionally passed for the liberation of insolvents; but these were but temporary in their nature, and partial in their operation, and the

[f] 19 & 20 Vict. c. 47, s. 84.
[g] Ibid. Sect. 82.
[h] Ibid. Sect. 86.
[i] 19 & 20 Vict. c. 47, s 88.
[j] Ibid. Sect. 89.
[k] Ibid. Sect. 89.

evil remained unabated until the year 1813, when the statute 53 Geo. III. c. 102, first established a regular system for the relief of insolvent debtors. This Act, which was only experimental, was followed by others, extending and carrying out the principle therein adopted, until finally the statute 1 & 2 Vict. c. 110, consolidated the law on this subject, and established the system now in operation. The creditor's power of continuing at his own pleasure the detention of the debtor is practically taken away, since the latter, as soon as he is incarcerated, may petition for his discharge from prison, on the terms of his whole property, present and future, being given up for distribution among his creditors. This system of relief is administered by *The Court for the Relief of the Insolvent Debtors in England*, whose sittings are held in London. The judges or commissioners of this court formerly made circuits throughout England and Wales, for the purpose of hearing the petitions of insolvents incarcerated in the country districts; but these circuits have been abolished, and in the country districts the petition is heard and disposed of by the judge of he county court of the district where the insolvent is imprisoned.[1]'

'The statute 1 & 2 Vict. c. 110, applies only to the case of the debtor who is actually imprisoned, the relief of this unfortunate class of persons having been the object principally in view in the earlier legislation with respect to insolvency. But the opinion gradually gained ground that it would be for the advantage of trade and of creditors in general, if debtors not within the scope of the bankrupt laws, and who might be threatened with, but not yet arrived at the last extreme of, insolvency, should be enabled to surrender their property for the benefit of their creditors, and in return be protected from legal process. This gave rise to the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, known as the Protection Acts. There are thus two distinct systems of insolvency law in operation, the one applicable to debtors who seek relief from actual imprisonment, the other to those who seek protection from the impending danger of losing their liberty.'

'Each of these systems I shall now explain a little more in detail. Let us therefore consider, with regard to proceedings under the Insolvent Act,'

[1] 10 & 11 Vict. c. 102.

'1. Who may petition the court for the relief of insolvent debtors; 2. The proceedings in insolvency; and 3. In what manner an estate in goods and chattels may be transferred by insolvency.'

Petition by prisoner.

1. Any person in actual custody for any debt, damages, costs, sum or sums of money,[m] except a Crown debt,[n] may petition the Court for the Relief of Insolvent Debtors, for his discharge from prison. He is entitled to do so within the first fourteen days of his imprisonment; after that period has elapsed, he cannot petition without first obtaining the leave of the court;[o] and if the debt be one in which the Crown is interested, the petition can be presented only with the consent of the Treasury, or upon application to the Barons of the Exchequer.'[p]

'The petition when presented on behalf of the insolvent must state the time and place of arrest, the names of the persons at whose suit he is detained, and the amount of the debt and costs.[q] It also prays for future liberty of the person against the demands for which the insolvent is in custody, and against the demands of all other persons who shall be or claim to be his creditors at the time of presenting the petition.'

'If the prisoner neglect for twenty-one days after arrest to make satisfaction for the debt, any creditor[r] who has charged him in execution may file a petition to have his estate vested in the provisional assignee, and distributed for the benefit of the creditors.'[s]

Petition by creditor.

'Thus the petition may emanate either from the prisoner himself, or any person who is interested in having his property distributed; a judicious and necessary arrangement; for experience shows that the loss of liberty is not always strong enough to induce a debtor to do justice to those to whom he is under obligation. And next as to the consequence of the petition.'

Vesting order.

2. 'Upon the filing of the petition, the court proceeds to make a *vesting order*,[t] to the effect that all the real and per-

[m] 1 & 2 Vict. c. 100, s. 35.

[n] Ibid. Sect. 103.

[o] Ibid. Sect. 35.

[p] Ibid. Sections 103, 104.

[q] Ibid. Sect. 35.

[r] Ibid. Sect. 36.

[s] The county courts, it may be noticed, have no jurisdiction in cases where a creditor petitions the insolvent court, but only in those cases in which the petition is presented by the prisoner himself for his discharge. (11 & 12 Vict. c. 102, s. 10.)

[t] 1 & 2 Vict. c. 110, s. 37.

sonal estate and effects of the prisoner within this realm and abroad (excepting the wearing apparel, and some other necessaries of the prisoner and his family and his working tools and implements, the whole not exceeding in value 20*l.*), and all the future interest of the prisoner in any real and personal estate and effects within the realm or abroad, which he may purchase, or which may revert, descend, or be devised or bequeathed to him before he shall become entitled to his final discharge; and all debts due, or which shall become due to him before that time, shall be vested in the provisional assignee; who thereupon proceeds to take the whole into his possession. The insolvent is entitled to apply to the court for an allowance for his support during his imprisonment, and for defraying the expenses of the schedule and balance-sheet which he next has to produce. This schedule must be delivered within fourteen days (unless the court permits a longer term) from the making of the order, and must contain a full description of the prisoner, his name, trade, or profession, his last usual place of abode, with an account of all debts owing, or growing due to him at the time of the order being made, and of all persons to whom he is himself indebted, with a full, true, and perfect account of his estate and effects of all kinds in possession or expectancy; of all places of benefit or emolument held by him; of all pensions or allowances held by him, or by others on his behalf; of all rights and powers which he, or any person in trust for him, has, and may exercise for his benefit. The schedule also contains a balance-sheet of his receipts and expenditure, and a description of the wearing apparel and other necessaries of himself and family, and of the working tools and implements which he may wish to except from the operation of the Act.'[u]

Schedule of debts

'A general balance-sheet is also prepared, showing the prisoner's receipts and expenditure from the date of the earliest debt in his schedule, up to the time of signing his petition; and with this must be stated the cause of the present insolvency, and the amount of debts, if any, still due under any prior insolvency or bankruptcy.'

Balance-sheet.

'This schedule and balance-sheet must be signed by the prisoner, and these, together with an estate-paper containing

Estate paper.

[u] 1 & 2 Vict. c. 110, s. 69.

an account of all his private property, real and personal, similarly signed, and an inventory of the excepted articles, with a certificate of valuation, made by an appraiser, and an affidavit of verification of the prisoner's signature, must all be filed in court, together with all books, papers, deeds, and writings in any way relating to his estate and effects, and which are in his possession or control.[v] If any item be fraudulently omitted in the schedule, or property of greater value than 20*l.* be fraudulently excepted, the prisoner may be indicted as for a misdemeanor, and punished with imprisonment and hard labour for a term not exceeding three years.'[w]

Examination of the prisoner.

'The next step in the proceedings is the examination of the prisoner, which, if he be imprisoned within a county court district, lying without the district assigned to the central insolvent court in London, takes place before the county court judge, the petition and schedule being transmitted by the insolvent court for this purpose to the registrar of the county court. Notice of the order for hearing is also given to the creditors at whose suit the insolvent is detained in custody, and to the other creditors named in his schedule, whose debts amount to 5*l.*; and this notice is also published in the Gazette and local newspapers.'[x]

'The prisoner is brought up by the gaoler in whose custody he is, upon a warrant issued for that purpose;[y] and he is then examined upon oath as to the contents of his schedule, which must be supported, if necessary, by such other evidence as the court may think fit to require. Any of the creditors may put questions to the prisoner, and produce and examine such witnesses as the court shall think fit, and oppose the prisoner's discharge, and if sufficient cause appear, the hearing may be adjourned.[z] The opposing creditor may also apply for a reference to an officer of the court, or an examiner, properly appointed, of the account and schedule produced, and the hearing may be adjourned until a report shall have been made.[a] After the hearing, or at the adjourned examination, the prisoner having sworn to the truth of his schedule, and executed a warrant of attorney, to be acted upon in future as occasion may require, for the recovery of the amount of the

[v] 1 & 2 Vict. c. 110, s. 69.
[w] Ibid. Sect. 99.
[x] Ibid. Sect. 71.
[y] 1 & 2 Vict. c. 110, s. 10.
[z] Ibid. Sect. 72.
[a] Ibid. Sect. 74.

debts contained in the schedule, the court may adjudge him to be discharged from custody, and entitled to the benefit of the Act.'[b]

Effect of discharge.

'By the effect of this adjudication, the insolvent becomes a free man as to all claims existing at the time of the making of the vesting order, and made by the creditors named in the schedule, and that not only as to monies then due, but also as to payments to become due in future by way of annuity or otherwise, and to claims of other persons not known to the prisoner at the time of adjudication, who may be holders of negotiable securities made by him, and set forth in the schedule.'[c]

'If, however, the opposing creditors have succeeded in establishing against the debtor the commission of certain acts of misconduct, as that the schedule does not contain a full, true, and perfect account and description of any of the particulars which it was the insolvent's duty to set forth without fraud or concealment, the discharge will not be granted unless the court see fit to allow the schedule to be amended.[d] Or if he has destroyed or concealed books or papers relating to his affairs, or has kept false books, or falsified entries therein, or has given an undue preference to one of his creditors by privately discharging or concealing any debt due from or to him, or has fraudulently made away with any of his property, the court may award his discharge to take place only after an imprisonment of three years.[e] And if it be shown that he has contracted debts by fraud, breach of trust, false pretences; or without reasonable expectation of being able to pay them; or has occasioned unnecessary expense to any creditor by frivolous and vexatious defences; or that he is indebted for damages in an action for criminal conversation, seduction, breach of promise of marriage, malicious prosecution, libel, or malicious injury; in all these cases the court may suspend his discharge until he shall have been in custody at the suit of the creditor aggrieved, for a period not exceeding two years.'[f]

'In the absence of opposition on these particular grounds, the insolvent is not entitled as of right to his discharge.[g] For in all cases the court, taking into consideration the previous conduct and proceedings of the insolvent, may either adjudge

[b] 1 & 2 Vict. c. 110, s. 75.
[c] Ibid. Sect. 75.
[d] Ibid. Sect. 69.
[e] 1 & 2 Vict. c. 110, s. 77.
[f] Ibid. Sect. 78.
[g] Ibid. Sect. 76.

the discharge to take place forthwith, or so soon as he shall have been in custody at the suit of one or more of the creditors, whose claims form the ground of the adjudication, for a period not exceeding six months.'

'But while the law thus prevents the fraudulent or criminal debtor from escaping entirely the punishment of his misconduct, the creditor who insists upon enforcing the penalty, may be compelled to provide, to some extent at least, for the support of the captive; for the insolvent, in cases where his discharge is suspended, may apply for, and the court may in its discretion order him, an allowance not exceeding four shillings a week.' [h]

Disposal of the insolvent's property.

'3. In the meantime, the property of the insolvent, which was first vested in the provisional assignee, is transferred to other assignees appointed by the court; but without formal conveyance or assignment, the acceptance alone by the assignees of the appointment causing the property immediately to vest in them, in trust for the benefit of the creditors. They also become clothed with all powers which the insolvent might have executed for his own benefit (except the right of nomination to a vacant ecclesiastical benefice), and all estates, real or personal, transferred by him to others, he being at the time insolvent, within three months before imprisonment;[i] and all property of his seized or sold, since imprisonment, by a creditor on a judgment voluntarily confessed, or bill of sale; and whether for valuable consideration or not; and goods and chattels of others, of which he had the order and disposition, and was the reputed owner at the time of his imprisonment, also pass to them.[j] But they have the option to accept or reject his leases[k] and agreements for leases; and if the insolvent be a beneficed clergyman or curate, they have no title to the income of his benefice or curacy; but in case of a benefice they may apply for its sequestration.[l] The pay of an officer in any department of Her Majesty's service, military, naval, or civil, or in the service of the East India Company, does not pass by the vesting order;[m] but the court, with the consent of the secretary at war, lords of the admiralty, or other autho-

[h] 1 & 2 Vict. c. 110, s. 86.
[i] Ibid. Sect. 59.
[j] Ibid. Sect. 61.
[k] 1 & 2 Vict. c. 110, s. 50.
[l] Ibid. Sect. 55.
[m] Ibid. Sect. 56.

rities, as the case may be, may order a portion of such pay or half-pay to be paid to the assignee for the creditors.'

'So much for the property of the prisoner, which is possessed by him, and available at the time of his insolvency.'

Future property.

'I have before alluded to the warrant of attorney executed by the prisoner previously to the adjudication of his discharge. This authorises a judgment to be entered up against him in favour of the provisional assignee to the amount of the debts stated in the schedule; but it can only be acted upon with the leave of the court.[n] If, then, at any time after the insolvent's discharge, it be made to appear to the court that he is in a condition to make a payment in or towards the discharge of his debts, or that he has died leaving effects available for this purpose, an order may be made, permitting execution to be taken out on the judgment, for such sum as shall appear fit. And thus not only the present, but also the after-acquired property of the insolvent may be applied in payment of his debts, a point in which the trader, subject to the operation of the bankrupt laws, has the advantage, as has been previously seen. Moreover, such after-acquired property of the insolvent as is not capable of being taken in execution, may be wrested from him by the court at the instance of the creditors; and for this purpose he may, after his discharge, be brought up for further examination upon oath;[o] and if there be reason to suppose that his discharge has been made on false grounds, it may, on rehearing, be annulled, and the insolvent remanded to custody.'

Division of insolvent's estate.

'The property which comes to the hands of the assignees is sold and disposed of by them, with the consent and under the direction of the court; and property which it might be prejudicial to dispose of immediately, may be mortgaged or otherwise managed for the benefit of the creditors.[p] Stock belonging to the insolvent may be transferred into the names of the assignees by order of the court.'[q]

'The property is divided from time to time among the creditors; and if the dividend be made before the adjudication of discharge, it is made amongst all such creditors as shall prove their debts; if subsequent to the adjudication, then

[n] 1 & 2 Vict. c. 110, s. 87.
[o] Ibid. Sect. 98.
[p] 1 & 2 Vict. c. 110, s. 48.
[q] Ibid. Sect. 54.

amongst all those whose debts are either proved or admitted in the schedule; the court having power to inquire into disputed claims, and to reject or modify them as occasion shall require.'[r]

Protection Acts.

'I now come to the Protection Acts, of which, as has been before stated, the object is to enable a debtor in insolvent circumstances to avert or forestall the impending danger of imprisonment. The statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, first gave jurisdiction to the Bankruptcy Court, over the cases to which these Acts were intended to apply; but this jurisdiction has now been transferred to the Court for the Relief of Insolvent Debtors in the central or metropolitan district, and to the county courts in the country districts. Pursuing our former method, I shall here consider, 1. Who may petition for protection. 2. The proceedings under the Protection Acts. And 3. In what manner the estates of insolvents are transferred under these statutes.'

1. Who may petition.

'1. Any person not being a trader within the meaning of the Bankrupt Acts, or who, being such a trader, owes debts to a less amount than 300*l.*, and whether he be in prison or not, may petition the insolvent court, if resident within twenty miles of London, or the county court of the district in which he has resided for the preceding six months. A full and true schedule[s] of the petitioner's debts, the names of his creditors, the date of contracting each debt, and the security (if any) given for the same, must accompany the petition. The petitioner must likewise set forth an account of his books and vouchers, and of his personal estate and effects, and of the liabilities affecting the same. This is called the estate-paper, and is signed and delivered in duplicate; and one copy is, on its delivery, transmitted to the broker appointed by the court, who thereupon proceeds to value the property. The petition and schedule must be verified by affidavit,[t] and if any accidental mistake appear, the judge may give leave for its amendment.[u] Wearing apparel and other necessaries not above the value of 20*l.* may be excepted from the schedule; but any fraudulent excess above the amount allowed, is

r 1 & 2 Vict. c. 110, s. 62.

s 5 & 6 Vict. c. 116, s. 1.

t 7 & 8 Vict. c. 96, s. 2.

u 7 & 8 Vict. c. 96, s. 30.

punishable as a misdemeanor, with imprisonment and hard labour for a term not exceeding three years.'[v]

2. Interim order of protection.

'2. The petition being filed, the court makes an *interim* order, which protects the petitioner from all process whatsoever, either against his person or his property, until his appearance in court for examination,[w] the only exception being that he may still be arrested under a judge's order, to hold him to bail, notwithstanding the protection.[x] If the petitioner be in prison at the time, the order effects his immediate discharge.'[y]

'The effect of the presentation of the petition is to vest immediately all the estate and effects of the petitioner in an official assignee, who, in protection cases, is the registrar of the court,[z] and who proceeds forthwith to possess himself of all that can be obtained without suit, in like manner as we have seen in the case of a bankrupt. The petitioner must deliver to him all monies, bills, notes, and securities in his possession or power, with his books and accounts. Notice of the filing of the petition is given to the creditors named in the schedule resident within the United Kingdom, whose debts amount to 5*l.*, and is inserted in the Gazette and the local newspapers, and a public sitting of the court is at the same time appointed for the first examination of the petitioner.[a]'

Examination of petitioner.

'At the time appointed, the petitioner is examined upon oath, as in the case of bankruptcy and insolvency. If it appear that the allegations in the petition and the matters in the schedule are true, and that the debts have not been contracted by fraud, or breach of trust, or without reasonable expectation on the petitioner's part of being able to pay them, or do not arise from a conviction in a criminal prosecution; that they do not result from judgment in any proceeding for breach of the revenue laws, breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, and other malicious offences; provided also a full discovery has been made, and no property has been parted with since presenting the petition, the judge may then appoint and order notice to be given of a day on which a final order shall be made, unless cause be shown to the contrary.[b] The examination may

[v] 7 & 8 Vict. c. 96, s. 39.

[w] 5 & 6 Vict. c. 116, s. 1. *Plutel* v. *Bevill* 2 Ex. 508.

[x] 7 & 8 Vict. c. 96, s. 2.

[y] 7 & 8 Vict. c. 96, s. 6.

[z] 10 & 11 Vict. c. 102, s. 5.

[a] 7 & 8 Vict. c. 96, s. 3.

[b] 5 & 6 Vict. c. 116, s. 4.

also be adjourned from time to time if necessary, and the order for protection may be renewed until the final order.[c] Unless, however, the above-mentioned matters be proved to the satisfaction of the judge, no final order can be made, nor can the protection be renewed; and if the petitioner was previously in prison, the judge remands him to his former custody.[d] Any petitioner guilty of prevarication or false statement, may be committed to prison for a term not exceeding a month.'[e]

3. Division of insolvent's estate.

'3. As to the estate and effects of the debtor. At the first examination, or an adjournment thereof, assignees may be chosen by the majority in number and value of the creditors then attending, the court having power to reject or remove any assignee who appears to be unfit.[f] Immediately upon the appointment of assignees, the whole of the petitioner's property, present and future, vests in them by virtue of the appointment alone.[g] The powers of the assignees are similar to those of assignees in bankruptcy, and their duties are in like manner to realize the property, and distribute it rateably among the creditors.'

Final order.

'If on the day appointed for making the final order, no cause be shown to the contrary, the petitioner is sworn again to the truth of his petition and schedule, and the final order is made, which is for the protection of the person of the petitioner from all process, in respect of the debts due, at the time of filing the petition, to the creditors named in the schedule. If the petition contains a proposal for the payment of the debts, which it may do, the order may direct the same to be carried into effect, and the court may, in its discretion, also order some allowance to be made to the petitioner out of the estate.'[h]

'On the other hand, if due cause appear, the court may adjourn the consideration of the final order *sine die*, or may dismiss the petition.[i] But notwithstanding such adjournment *sine die*, or dismissal of the petition, the court may, in its discretion, subsequently entertain the petition again, and make an order for protection.[j] After a final order has been made, it

[c] 5 & 6 Vict. c. 116, s 5.
[d] 7 & 8 Vict. c. 96, s. 24.
[e] 5 & 6 Vict. c. 116, s. 6.
[f] 7 & 8 Vict. c. 96, s. 3.
[g] 7 & 8 Vict. c. 96, s. 4.
[h] 5 & 6 Vict. c. 116, s. 4.
[i] 7 & 8 Vict. c. 96, s. 27.
[j] 7 & 8 Vict. c. 96, s. 26.

is also competent for any creditor, or for the official or other assignee, to apply to the court to rescind it,[k] which will be done provided it be shown that the petitioner has been guilty of any concealment before the making of the final order, or if he has since that time failed to give notice to the assignees of property subsequently acquired by him.'

'The proceedings in insolvency are, it will be observed, analogous to those in a bankruptcy, but this essential point of difference exists, that whereas the bankrupt is freed from all future claims upon his after-acquired property, so that he begins the world again without incumbrance, the insolvent still remains burdened with the whole amount of his debts, which his present property is unequal to discharge, and all future acquisitions which he may make are for the benefit of his creditors. Under the Act for the Relief of Insolvent Debtors, the subsequently-acquired property of the insolvent is reached by the warrant of attorney which he is compelled to give previous to his discharge. This process is not resorted to under the Protection Acts, but it is provided[l] that the assignees shall be entitled to claim from the petitioner, at any time after the making of the final order, any estate and effects acquired by him at any time; all of which shall absolutely vest in the assignees, upon their filing in court a copy of their claim after it has been served personally upon the petitioner, or left at his residence. But they can only take possession of such estate and effects under the authority of an order of the court, to such extent and in such manner as it may direct.'

[k] 5 & 6 Vict. c. 116, s. 12.

[l] 5 & 6 Vict. c. 118, s. 9.

CHAPTER XXXII.

OF TITLE BY WILL AND ADMINISTRATION.

[489] THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz., by *testament* and *administration.* And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XII., XIII. In the pursuit then of this joint subject, I shall, *first,* inquire into the origin and antiquity of testaments and administrations; shall, *secondly,* show who is capable of making a last will and testament; shall, *thirdly,* consider the nature of a testament and its incidents; shall, *fourthly,* show what an executor and administrator are, and how they are to be appointed; and, *lastly,* shall select some few of the general heads of the office and duty of executors and administrators.

Origin of wills and administrations.

First, as to the *origin* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts, and contracts. [490] But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where

no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament:* the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law, we call in England an *administration;* being the same which the civil lawyers term a succession *ab intestato,* and which answers to the descent or inheritance of real estates.

Testaments are of very high antiquity. We find them in use among the ancient Hebrews; though I hardly think the example usually given,[a] of Abraham's complaining that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to show that he had made him so by *will.* And indeed a learned writer[b] has adduced this very passage to prove, that, in the patriarchal age, on failure of children, or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law. But (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal,* whereby he disposed of the whole world[c]), I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings, wherein [491] Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens,[d] but in many other parts of Greece they were totally discountenanced.[e] In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing:[f] and, among the northern nations, particularly among the Germans,[g] testa

[a] Barbeyr. Puff. 4, 10, 4; Godolph. Orph. Leg. 1, 1.
[b] Taylor's Elem. Civ. Law, 517.
[c] Selden, de Succ. Ebr. c. 24.
[d] Plutarch. in Vitâ Solon.
[e] Pott. Antiq. l. 4, c. 15.
[f] Inst. 2, 22, 1.
[g] Tacit. de Mor. Germ. 21.

ments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state, which has permitted it in some countries and denied it in others; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven.[h]

With us in England this power of bequeathing is coeval with the first rudiments of the law; for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the Conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "If any one depart this "life intestate, be it through his neglect, be it through "sudden death; then let not the lord draw more from his "property than his lawful heriot. And, according to his direc-"tion, let the property be distributed very justly to the wife "and children and relations; to every one according to the "degree that belongs to him."[i] But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us,[j] that by the common law, as it stood in the reign [492] of Henry the Second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal.[k]

Reasonable parts of widow and children.

The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them.[l]

This continued to be the law of the land at the time of *Magna Charta*, which provides that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and, if

[h] Sp. L. b. 27, c. 1; Vinnius in Inst. l. 2, tit. 10.

[i] LL. Canut. c. 71; 1 Thorpe, 413.

[j] L. 2, c. 5.

[k] Bracton, l. 2, c. 26; Flet. 1, 2, c. 57.

[l] F. N. B. 122.

nothing be owing to the Crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis.*"[m] In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law,[n] though frequently pleaded as the local custom of Berks, Devon, and other counties:[o] and Sir Henry Finch lays it down expressly,[p] in the reign of Charles the First, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed, Sir Edward Coke[q] is of opinion that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine, he relies on a passage in Bracton, which, in truth, when compared with the context, makes directly against his opinion. For Bracton[r] lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, *Magna Charta*, Fleta, the Year-Books, Fitzherbert, and Finch do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland. To which we may add, that whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times; when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided; the one 4 & 5

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[m] 9 Hen. III. c. 18.

[n] A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hactenus usitatam et approbatam, uxores debent et solent a tempore, &c., habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et si habuerint, tunc tertiam partem, &c.:* and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed (M. 30 Edw. III. 25). And a similar case occurs in H. 17 Edw. III. 9.

[o] Reg. Brev. 142; and see also Co. Litt. 176.

[p] Law. 175.

[q] 2 Inst. 33.

[r] L. 2, c. 26, § 2.

W. & M. c. 2, explained by 2 & 3 Ann. c. 5, for the province of York; another 7 & 8 W. III. c. 38, for Wales; and a third, 11 Geo. I. c. 18, for London: whereby it is enacted, that persons, within those districts, and liable to those customs, may (if they think proper) dispose of *all* their personal estates by will; and the claims of the widow, children, and other relations to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter) to remember his lord and the church, by leaving them his two best chattels, which was the origin of heriots and mortuaries; and afterwards he was left at his own liberty to bequeath the remainder as he pleased.

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Intestacy.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases, it is said, that by the old law the king was entitled to seize upon his goods, as the *parens patriæ* and general trustee of the kingdom. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition.[s] Afterwards the Crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, says Perkins,[t] because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given by the Crown to the ordinary, and he might seize them, and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money *in pios usus;* and if he did otherwise, he broke the confidence which

[s] *Hensloe's case*, 9 Rep. 37, 38.

[t] § 486.

the law reposed in him.[u] So that, properly, the whole interest and power which were granted to the ordinary, were only those of being the king's almoner within his diocese, in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious.[v] And, as he had thus the disposition of intestates' effects, the probate of wills of course followed; for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

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The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct.[w] But even in Fleta's time it was complained,[x] "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV.,[y] written about the year 1250, wherein he lays it down for established canon law, that "*in Britanniâ tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus the popish clergy took to themselves[z] (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two-thirds of the wife and children were deducted, without paying even his lawful debts or other charges thereon. For which reason, it was enacted by the statute of Westm. 2, that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will:[a] a use more truly pious, than any *requiem* or mass for his soul. This was the first check given to that exorbitant power with which the law

Ordinary bound to pay debts.

[u] Finch, Law. 173, 174.

[v] Plowd. 277.

[w] Plowd. 277.

[x] L. 2, c. 57, § 10.

[y] In Decretal. l. 5, t. 3, c. 42.

[z] The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond, in Yorkshire, this proportion was settled by a papal bull, A.D. 1254 (Regist. Honoris de Richm. 101), and was observed till abolished by the stat. 26 Hen. VIII. c. 15.

[a] 13 Edw. I. c. 19. This statute was held to be declaratory of the common law in *Snelling's case*, 1 Rep. 83.

had intrusted the ordinary: but, though the prelates were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of [496] their immediate dependents; and therefore the statute 31 Edw. III. c. 11, provides that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the origin of *administrators*, as they at present stand, who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted[b] to be the *next of blood* that is under no legal disabilities. The statute 21 Henry VIII. c. 5, enlarges a little more the power of the ecclesiastical judge, and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

Administration, to whom granted.

Widow administratrix.

Upon this footing stands the general law of administrations at this day: I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to show the origin and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

2 Who cannot make a will.

I proceed now, *secondly*, to inquire who may, or may not, make a testament; or what persons are absolutely obliged by

[b] 9 Rep. 39.

law to die intestate. And this law[c] is entirely prohibitory; for, regularly, every person has full power and liberty to make a will, that is not under some special prohibition by law or custom, which prohibitions are principally upon three accounts: for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct. [497]

1. Infants, lunatics, idiots.

1. In the first species are to be reckoned *infants*, 'that is, persons under the age of twenty-one, who, under the statute which now regulates the law of testaments, 1 & 2 Vict. c. 26, are incapable of making a will. Before the passing of this Act, a will of personal estate might have been made by a male infant at the age of fourteen, or a female infant at the age of twelve,' which is the rule of the civil law.[d] Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.

2. Persons under duress.

2. Such persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like.[e] But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme-coverts, our laws differ still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole. But with us, a married woman is not only utterly incapable of devising *lands*, being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5, but also she is incapable of making a testament of *chattels*, without the licence of her husband. For all her personal chattels are

Married women. [498]

[c] Godolph. Orph. Leg. p. 1, c. 7.

[d] Godolph. p. 1, c. 8; Went. 212; 2 Vern. 104, 469; *Hyde* v. *Hyde*, Gilb. Rep. 74; Co. Litt. 89.

[e] Godolph. p. 1, c. 9.

[f] Ff. 31, 1, 77.

absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another.[g] Yet by her husband's licence she may make a testament;[h] and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but such licence is more properly his *assent;* for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand has given her permission to make a will.[i] Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed.[j] So that in reality the woman makes no will at all, but only something like a will;[k] operating in the nature of an appointment, the execution of which, the husband, by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For though a son who was *in potestate parentis* could not by any means make a formal and legal testament, even though his father permitted it,[l] yet he might, with the like permission of his father, make what was called a *donatio mortis causâ.*[m] The queen consort is an exception to this general rule, for she may dispose of her chattels by will without the consent of her lord:[n] and any feme-covert may make her will of goods, which are in her possession *in autre droit*, as executrix or administratrix; for these can never be the property of the husband:[o] and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament, without the control of her husband,[p] 'as she may of personal property given to her for her sole and separate use.'[q] But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is a revocation in law,[r] and entirely vacates the will.[s]

Queen consort.

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[g] 4 Rep. 51.

[h] Dr. & St. d. 1, c. 7.

[i] Bro. Abr. tit. *Devise*, 34; Stra. 891; Williams, Law of Executors, vol. i. page 48. 5th ed.

[j] *Rex* v. *Betteswoorth*, Stra. 891.

[k] Cro. Car. 376; 1 Mod. 211.

[l] Ff. 28, 1, 6.

[m] Ff. 39, 6, 25.

[n] Co. Litt. 133.

[o] Godolph. 1, 10.

[p] Prec. Chan. 44.

[q] *Dingwall* v. *Askew*, 1 Cox, 427.

[r] 4 Rep. 60; 2 P. Wms. 624; 1 Vict. c. 26, s. 18.

[s] 'Sir William Blackstone here adds to those who are *incapacitated* from making a will,' 'persons incapable of

III. The nature and incidents of wills.

Let us next, *thirdly*, consider what this last will and testament is, which almost every one is thus at liberty to make; or what are the nature and incidents of a testament. Testaments, both Justinian[t] and Sir Edward Coke[u] agree to be so called, because they are *testatio mentis:* an etymon which seems to savour too much of the conceit; it being plainly a substantive derived from the verb *testari*, in like manner as *juramentum, incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit:*"[v] which may be thus rendered into English, "the legal declaration of a man's intentions, which he wills to be performed after his death." It is called *sententia*, to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his *will:* it is *justa sententia;* that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

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Written or verbal.

These testaments were formerly divided into two sorts; *written*, and *verbal* or *nuncupative;* of which the former was committed to writing, the latter depended merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to

'doing so' on account of their criminal conduct, viz., all traitors and felons, from the time of conviction; for then (he says) their goods and chattels are no longer at their own disposal, but forfeited to the Crown. 'But in this case the will is of no effect, not from the incapacity of the testator, but because he has no goods to bequeath. And a similar observation applies to the other instance given by Blackstone, that of a *felo de se*, whose' goods and chattels are forfeited by the act and manner of his death, although he may make a devise of his lands, for they are not subjected to any forfeiture (Plowd. 261). Thus also outlaws, though it be but for debt, 'are held to be' incapable of making a will, for their goods and chattels are forfeited during the time (Fitz. Abr. tit. *Descent*, 16) 'the outlawry subsists. It would seem also that the testator must *die* an outlaw, for a will now takes effect from the time of the *death* (1 Vict. c. 26, s. 24), and not from *its date* as formerly.' As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments (as usurers, libellers, and others of a worse stamp), by the common law their testaments may be good (Godolph. p. 1, c. 12). And in general the rule is, and has been so at least ever since Glanvil's time (L. 7, c. 5), *quod libera sit cujuscunque ultima voluntas.*

[t] Inst. 2, 10.

[u] 1 Inst. 111, 322.

[v] Ff. 28, 1, 1.

Codicil.

writing. A *codicil, codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator.[w] This might also have been either written or nuncupative.

But, as *nuncupative* wills and codicils ('which were used when the art of writing was less universal than at present') are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II. c. 3, laid them under many restrictions; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it enacted: 1. That no written will should be revoked or altered by a subsequent nuncupative one, except the same were in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same were proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann. c. 16, were required to be such as are admissible upon trials at common law. 2. That no nuncupative will should in anywise be good, where the estate bequeathed exceeded 30*l.*, unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven),[x] and unless they or some of them were specially required to bear witness thereto by the testator himself; and [501] unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he were surprised with sickness on a journey, or from home, and died without returning to his dwelling. 3. That no nuncupative will should be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor should it be proved till fourteen days after the death of the testator, nor till process had first issued to call in the widow, or next of kin, to contest it, if they should think proper. The legislature having provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, the thing itself fell into disuse, and, 'even previous to the recent Wills Act was' hardly ever heard of, but in the only instance where favour ought to be shown to it, when the testator was surprised by sudden and

[w] Godolph. p. 1, c. 1, § 3.

[x] Inst. 210, 14.

violent sickness. The testamentary words must have been spoken with an intent to bequeath, not any loose idle discourse in his illness; and he must have required the bystanders to bear witness of such his intention: the will must have been made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions from strangers; it must have been in his *last* sickness, for if he recovered, he might alter his dispositions, and had time to make a written will; it must have been proved at not too long a distance from the testator's death, lest the words should have escaped the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should have been put to inconvenience or surprised. 'But the Wills Act, 1 Vict. c. 26, did away with these nuncupative wills, with the sole exception of the case of soldiers in actual military service and mariners or seamen at sea. These may dispose of their personal estate as they might have done before the making of the statute.'

Written wills, 'previously to the recent Wills Act,' needed not any witness of their publication. 'This is not to be understood' of devises of lands, which are 'in their origin' quite of a different nature, being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it had neither his name nor seal to it, nor witnesses present at its publication, 'was formerly' good, provided sufficient proof could be had that it was his handwriting.[y] And though written in [502] another man's hand, and never signed by the testator, yet if proved to have been according to his instructions, and approved by him, it was held a good testament of the personal estate.[z] Yet it 'was considered' the safer and more prudent way, as leaving less in the breast of the ecclesiastical judge, if it were signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton;[a] or, rather, he in this respect implicitly copied the rule of the civil law. 'But the Wills Act has put all wills, whether of personal or real estate, upon the same footing, and every will must now be signed by the testator, or by some person in his presence, and by his direction, in the presence

[y] Godolph. p. 1, c. 21; Gilb. Rep. 260.

[z] Comyn, 452, 3, 4.

[a] F. 2, c. 26.

of two witnesses at least, present at the same time, who must subscribe and attest the will in the testator's presence. And no further publication besides this is required.'

Will inoperative before death.

No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem.*"[b] And therefore, if there be many testaments, the last overthrows all the former:[c] but the 're-execution' of a former will revokes one of a later date, and establishes the first again.[d]

Wills, how avoided.

Hence, it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before mentioned: 2. By making another testament of a later date: and, 3. By cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable.[e] For this, says Lord Bacon,[f] would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is, alteration or repentance. It was also formerly held, that, without an express revocation, if a man who had made his will, afterwards married and had a child, this was a presumptive or implied revocation of his former will, which he made in his state of celibacy.[g] 'But now, by express enactments (1 Vict. c. 26, ss. 18, 19), marriage alone, irrespective of the birth of children, is a total revocation of a prior will; while no will is revoked by any presumption of intention on the ground of change of circumstances.' The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient [503] reason) any of the children of the testator.[h] But, if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving

[b] Co. Litt. 112.
[c] Litt. § 168; Perk. 478.
[d] Perk. 479.
[e] 8 Rep. 82.
[f] Elem. c. 19.
[g] *Lugg* v. *Lugg*, Lord Raym. 441; 1 P. Wms. 204.
[h] Inst. 2, 18, 1.

the heir a shilling or some other express legacy, in order to disinherit him effectually; whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.

4. Executors and administrators.

We are next to consider, *fourthly*, what is an executor, and what an administrator, and how they are both to be appointed.

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors.[i] 'And accordingly, by the statute 38 Geo. III. c. 87, s. 6, where an infant is appointed sole executor, administration with the will annexed shall be granted to the guardian of the infant, or to such other person as the Spiritual Court shall think fit, until the infant shall have attained the age of twenty-one years. But if there be several executors, one of whom is of full age, no administration *durante minore ætate* ought to be granted, for he who is of full age may execute the will.'[j] In like manner, administration may be granted *durante absentiâ*, or *pendente lite;* when the executor is out of the realm,[k] or when a suit is commenced in the Ecclesiastical Court touching the validity of the will.[l] This appointment of an executor is essential to the making of a will;[m] and it may be performed either by express words, or such as strongly imply the same.[n] But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must grant administration *cum testamento annexo*[o] to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore ætate*, &c., of another, is very little different from that of an executor. And this was law so early as the reign of Henry II., when Glanvil[p] informs us, that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc*

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[i] West. Symb. p. 1, § 635.
[j] *Foxurst* v. *Tremain*, 1 Mod. 47.
[k] 1 Lut. 342.
[l] 2 P. Wms. 589, 590.
[m] Went. c. 1; Plowd. 281.
[n] Cro. Eliz. 43, 16; 1 Hagg. 80.
[o] 1 Roll. Abr. 907; Comb. 20.
[p] L. 7, c. 6.

nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere."

Administration.

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the Third and Henry the Eighth direct. 'The latter statutes, we may recollect, enabled the ordinary to grant administration *either* to the widow, *or* to the next of kin, *or* to both of them at his discretion; and where two or more persons are in the same degree of kindred, it gives the ordinary his election to accept whichever he pleases; enlarging in this respect the power of the ecclesiastical judge, who is directed by the statute 31 Edw. III. c. 11, to depute the nearest and most lawful friends of the deceased to administer his goods. And this leads us naturally to a consideration of the rules which are followed in tracing consanguinity or relationship, whereby the nearest and most lawful friends of the deceased are ascertained.'[q]

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium,*" the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity), and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil[r] and canon,[s] a in the common law.[t]

[q] The following disquisition on consanguinity is transferred from pp. [202]—[207] of the Commentaries of Sir William Blackstone. See *ante*, p. 199, note [b].

[r] Ff. 38, 10, 10.

[s] Decretal. l. 4, tit. 14.

[t] Co. Litt. 23.

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has within no very great number of degrees; and so many different bloods is a man said to contain in his veins, as he has lineal ancestors. Of these he has two in the first ascending degree, his own parents; he has four in the second, the parents of his father and the parents of his mother; he has eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he has a hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man has above a million of ancestors, as common arithmetic will demonstrate.[u] This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium:* since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

Collateral consanguinity.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Colla-

[u] This will seem surprising to those who are unacquainted with the increasing power of progressive numbers; but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also 2; or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree; the number of whom is doubled at every remove, because each of our ancestors has also two immediate ancestors of his own:—

Lineal Degrees.	*Number of Ancestors.*
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65536 of 256; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

teral kinsmen are such, then, as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

We must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related: why? because both are derived from one father: *Titius* and his first cousin are related: why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by Holy Writ that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For indeed, if we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more (and without such a supposition, the human species must be daily diminishing), we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more.[v]

[v] This will swell more considerably than the former calculation; for here, though the first term is but 1, the denominator is 4; that is, there is *one* kinsman (a brother) in the first degree, who makes, together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it (4). For, since each couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards; but we have seen that the ancestors in-

And if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

Degrees by the canon law.

The method of computing these degrees in the canon law is as follows:—We begin at the common ancestor and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. [207] Thus *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of *Titius*. Or (to give a more illustrious instance from our English annals), King Henry the Seventh, who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus*, therefore, in the table of consanguinity represent King Richard the Third, and the class marked (e) King Henry the Seventh. Now their common stock or ancestor

crease upwards in a duplicate *ratio;* therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio.*

Collateral Degrees.	*Number of Kindred.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may also be formed by a more compendious process, viz., by squaring the couples, or half the number of ancestors, at any given degree, which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account, that is, whether on an average every man has not one brother or sister, four first cousins, sixteen second cousins, and so on, we shall find that the present calculation is very far from being overcharged.

was King Edward the Third, the *abavus* in the same table: from him to Edmund Duke of York, the *proavus*, is one degree; to Richard Earl of Cambridge, the *avus*, two; to Richard Duke of York, the *pater*, three; to King Richard the Third, the *propositus*, four; and from King Edward the Third to John of Gaunt (a) is one degree; to John Earl of Somerset (b), two; to John Duke of Somerset (c), three; to Margaret Countess of Richmond (d), four; to King Henry the Seventh (e), five: which last-mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law.

Degrees by the civil law

Though, according to the computation of the civilians (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending) these two princes were related in the ninth degree; for from King Richard the Third to Richard Duke of York is one degree; to Richard Earl of Cambridge, two; to Edmund Duke of York, three; to King Edward the Third, the common ancestor, four; to John of Gaunt, five; to John Earl of Somerset, six; to John Duke of Somerset, seven; to Margaret Countess of Richmond, eight; to King Henry the Seventh, nine.[w]

'To return from this digression on consanguinity, to a consideration of the rules by which the ordinary is to be guided in committing the administration of the goods of an intestate to the nearest and most lawful friends of the deceased, it is to be observed,' 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife to the husband or his representatives;[x] and of the husband's effects, to the widow or next of kin; but he may grant it to either, or both, at his discretion.[y] 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases. 3. That this *nearness* or propinquity

[w] See the Table of Consanguinity, wherein all the degrees of collateral kindred to the *propositus* are computed so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common cyphers.

[x] Cro. Car. 106; 29 Car. II. c. 3; 1 P. Wms. 381.

[y] *Fawtry* v. *Fawtry*. Salk. 36: Stra. 552.

of degree shall be reckoned according to the computation of the civilians;[z] and not of the canonists; because in the civil computation the intestate himself is the *terminus a quo* the several degrees are numbered, and not the common ancestor according to the rule of the canonists. And therefore, in the first place, the children, or (on failure of children) the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us[a] the children are allowed the preference.[b] Then follow brothers,[c] grandfathers,[d] uncles or nephews[e] (and the females of each class respectively), and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and were formerly[f] only excluded from inheritances of land upon feudal reasons. Therefore, the brother of the half blood shall exclude the uncle of the whole blood;[g] and the ordinary may grant administration to the sister of the half, or brother of the whole, blood at his own discretion;[h] 'though the rule is, where two persons in equal degree apply, to prefer the one of the whole blood.'[i] 5. If none of the kindred will take out administration, a creditor may, by custom, do it.[j] 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin.[k] 7. And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done[l] before the statute of Edward III.) to such discreet person as he approves of; or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody,[m] and to

[505]

[z] Prec. Chanc. 593.

[a] Godolph. p. 2, c. 34, § 1. 2 Vern. 125.

[b] In Germany there was a long dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory, and so the law was established in their favour, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28.)

[c] Harris in Nov. 118, c. 2.

[d] Prec. Chanc. 527. 1 P. Wms. 41.

[e] Atk. 455.

[f] See *ante*, p. 216.

[g] 1 Ventr. 425.

[h] Aleyn. 36 Styl. 74.

[i] Cases *temp.* Lee, 299.

[j] Salk. 38.

[k] 1 Sid. 281. 1 Ventr. 219.

[l] Plowd. 278.

[m] Went. ch. 14.

do other acts for the benefit of such as are entitled to the property of the deceased.[n] If a bastard, who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it has formerly been held[o] that the ordinary might seize his goods, and dispose of them *in pios usus*. But the usual course now is for some one to pro- [506] cure letters-patent or other authority from the Crown; and then the ordinary of course grants administration to such appointee of the Crown.[p]

Interests of executor and administrator.

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself;[q] but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A.[r] For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A. is merely the officer of the ordinary, prescribed to him by Act of Parliament, in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And

Administrator *de bonis non*.

this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property.[s] But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, viz., of certain

[n] 2 Inst. 398.

[o] Salk. 37.

[p] 3 P. Wms. 33. It is usual for the Crown to grant the administration to some relation of the bastard's father or mother, reserving one-tenth or other small proportion of it. (1 Wood, 398.) —[CHRISTIAN.]

[q] Stat. 25 Edw. III. st. 5, c. 5. 1 Leon. 275.

[r] Bro. Abr. tit. *Administrator*, 7.

[s] Styl. 225.

specific effects, such as a term of years, and the like; the rest being committed to others.[t]

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Office and duty of executor and administrator.

Having thus shown what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an executor may do many acts before he proves the will;[u] but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will, and not from the probate,[v] the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased,[w] and many other transactions),[x] he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong.[y] Such a one cannot bring an action himsel in right of the deceased,[z] but actions may be brought against him. And, in all actions by creditors against such an officious intruder, he shall be named an executor, generally;[a] for the most obvious conclusion which strangers can form from his conduct is, that he has a will of the deceased, wherein he is named executor, but has not yet taken probate thereof.[b] He is chargeable with the debts of the deceased, so far as assets

Executor *de son tort.*

[t] 1 Rol. Abr. 908. Godolph. p. 2, c. 30. Salk. 36.

[u] Wentw. ch. 3. He may commence an action, but 'proceedings will be stayed at the request of the defendant, until he produces the probate. (*Webb* v. *Atkins*, 14 C. B. 401.)' And he may release or pay a debt, may assent to a legacy, and be sued, before probate, and do other acts, which seem to be fully enumerated in 1 Salk. 299, and Com. Dig. *Administrator*, B. 9. — [CHRISTIAN.]

[v] Comyn, Rep., 151.

[w] 5 Rep. 33, 34.

[x] Wentw. ch. 14. See also the stat. 43 Eliz. c. 8.

[y] Dyer, 166.

[z] Bro. Abr. tit. *Administrator*, 8.

[a] 5 Rep. 31. 1 Wms. Saund. 265, n. 2.

[b] 12 Mod. 471.

come to his hands:[c] and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree,[d] himself only excepted.[e] And [508] though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages;[f] unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.[g] Let us now see what are the power and duty of a rightful executor or administrator, 'who takes the administration of the estate on himself. For the proper execution of this duty is attended with so much difficulty, risk, and responsibility, that in almost all cases in which there are outstanding debts to collect, or claims to enforce, and liabilities on the part of the deceased to be ascertained and discharged, the executor or administrator resorts at once to the Court of Chancery, under whose direction the estate will be administered, and all responsibility on their part avoided. The principles on which the courts of equity exercise this most important branch of their jurisdiction will be more appropriately considered in the third volume of these Commentaries.'

1. To bury deceased.

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.[h]

2. To prove the will, &c.

2. The executor, or the administrator *durante minore ætate*, or *durante absentiâ*, or *cum testamento annexo*, must *prove the*

[c] Dyer, 166.

[d] 1 Chan. Cas. 33.

[e] 5 Rep. 30. Moor. 527.

[f] 12 Mod. 441, 471.

[g] Wentw. ch. 14. It is held that the least intermeddling with the effects of the intestate, even milking cows, or taking a dog, will constitute an executor *de son tort* (Dy. 166). An executor of his own wrong will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. 3 T. R. 590; 2 T. R. 100.—[CHRISTIAN.] See also *Camden* v. *Fletcher*, 4 Mee. & W. 378.

[h] Salk. 296; Godolph. p. 2, c. 26, § 2; 3 Atk. 119; *Edwards* v. *Edwards*, 2 Cr. & M. 612; *Hancock* v. *Podmore*, 1 B. & Ad. 260.

will of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed.[i] When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the *probate*. In defect of any will, the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10, enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative;[j] whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to Archbishop Chichele, interprets these hundred shillings to signify *solidos legales*; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 16*l.* 13*s.* 4*d.* He therefore computes[k] that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0¼*d.* This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London,[l] and indeed everywhere else,[m] were of the value of ten pounds by *composition*; for if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value

Probate.

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Bona notabilia.

[i] Godolph. p. 1, c. 20, § 4.

[j] 4 Inst. 335.

[k] Provinc. l. 3, t. 13, c. item, *v. centum, &c.* statutum *v. laicis.*

[l] 4 Inst. 335; Godolph. p. 2, c. 22.

[m] Plowd. 281.

to a hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l*. But the makers of the canons of 1603 understood this ancient rule to be meant of the shillings current in the reign of James I., and have therefore directed[n] that *five pounds* shall for the future be the standard of *bona notabilia*, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation; that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the [510] deceased other than such as lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia;* besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is, therefore, very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates that have large and diffusive property, in the Prerogative Court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects.

3. The inventory.

3. The executor or administrator is to make an *inventory*[o] of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. Collection of assets.

4. He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the

[n] Can. 92.

[o] Stat. 21 Hen. VIII. c. 5.

deceased,[p] and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors 'or administrators,' a sale or release by one of them shall be good against all the rest.[q] Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered; for, [511]

5. Payment of debts.

5. The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the Crown on record or specialty.[r] Thirdly, such debts as are by particular statutes to be preferred to all others; as money due upon poor rates,[s] for letters to the post-office,[t] and some others. Fourthly, debts of record; as judgments,[u] 'decrees in equity,'[v] statutes, and recognizances.[w] Fifthly, debts due on special contracts; as for rent ('which is regarded as a specialty debt, even when reserved on a demise by parol[x]) or upon bonds, covenants, and the like, under seal.[y] Lastly, debts on simple contracts, viz. upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some[z] with reason preferred to any other: and so stood the

[p] Co. Litt. 209.

[q] Dyer, 23; *Jacomb* v. *Harwood*, 2 Ves. sen. 267.

[r] 1 And. 129.

[s] Stat. 17 Geo. II. c. 38.

[t] Stat. 9 Ann. c. 10

[u] 'Formerly, under 5 W. & M. c. 20, a judgment debt did not take precedence of a simple contract debt, unless docketed under that Act; but the docketing of judgments has now been abolished, and no similar enactment has been made with regard to the registration which has been substituted for the dockets.' See Williams on Executors, v. ii. p. 861.

[v] *Shafto* v. *Powel*, 3 Lev. 355; *Maurice* v. *B. of England*, 3 Swanst. 573.

[w] 4 Rep. 60; *Goldsmith* v. *Sydnor*, Cro. Car. 363.

[x] *Gage* v. *Acton*, Ld. Raym. 515; 1 Freem. 512; 9 Price, 464.

[y] Wentw. ch. 12.

[z] 1 Roll. Abr. 927.

ancient law, according to Bracton[a] and Fleta,[b] who reckon among the first debts to be paid, *servitia servientium et stipendia famulorum*. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to.[c] But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the [512] rule of law.[d] If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no:[e] provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary.[f] Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.[g]

'What has been stated as to the *order* in which the debts of the deceased are to be paid from the *assets*, refers only to *legal* assets, between which and *equitable* assets a distinction is to be made, the nature of which shall be explained in the third volume of these Commentaries, when I come to consider the principles on which the Court of Chancery administers the estate and marshals the assets of a deceased person. In the meantime it may be enough to state, that *equitable assets* comprise every kind of property which comes to an executor's hands in any other than his legal capacity, and so can only be reached in equity. These are applicable in payment of all debts of whatever degree *pari passu*. And where the admi-

[a] L. 2, c. 26.

[b] L. 2, c. 56, § 10.

[c] 10 Mod. 496; vol. iii. p. 21.

[d] 5 Rep. 30.

[e] Plowd. 184; Salk. 299. 'In the case of an executor, the debt is actually discharged and gone (*Freakly* v. *Fox* 9 B. & C. 130); but if the debtor is appointed administrator, this is merely a suspension of the remedy, because the administrator is made such by the *act of law* (Salk. 306). In equity this release does not operate to the executor's benefit against the legatees or next of kin, the court regarding the debt as having been paid by the debtor to himself in his representative capacity, and therefore as assets.'

[f] Salk. 303; 1 Roll. Abr. 921.

[g] Dyer, 32; 2 Leon. 60.

nistration of assets falls into the hands of a court of equity, they are distributed in equal proportion, without regard to their nature or degree,[h] except that voluntary bonds, or other special contracts without consideration, are postponed to other debts.[i] It may be added here, also, that by statute 11 Geo. IV. and 1 Will. IV. c. 47, and 3 & 4 Will. IV. c. 104, real estate, whether freehold or copyhold, and whether devised (unless devised for payment of, or charged in the debts) or descended, is made assets, to be administered in equity for payment of simple contract debts; so that a simple contract creditor, instead of proceeding at law against the executor, and running the risk of a plea of *plene administravit*, may at once appeal to the Court of Chancery, and have his claim paid from the real estate of the deceased. The statutes which enable a simple contract creditor to take this step, expressly reserve a priority to specialty creditors.'

6. Legacies.

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.[j]

A legacy is a bequest or gift of goods and chattels by testament, and the person to whom it was given is styled the legatee. This bequest transfers an inchoate property to the legatee; but the right is not perfect without the assent of the executor; for, if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor.[k] For in him all the chattels are vested, and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator; the rule of equity being, that a man must be just before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law,[l] "*de bonis defuncti primo*

[h] 1 Camp. N. P. 148.

[i] 3 P. Wms. 222.

[j] 2 Vern. 434; 2 P. Wms. 25.

[k] Co. Litt. 111; Aleyn, 3, 9. In *Deeks* v. *Strutt* (5 T. R. 690), it was determined that no action can be maintained in a court of law to recover a legacy; although, if the executor assent, an action at law may be maintained for a *specific* legacy, as for a lease or any other chattel.—[CHRISTIAN.] 'But an action at law cannot be maintained for a distributive share of an intestate's property, although the executor or administrator may have expressly promised to pay it (*Jones* v. *Tanner*, 7 B. & C. 542), except in cases within the jurisdiction of the county court. (See vol. iii. pp. 39, 105.')

[l] L. 2, c. 26.

deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis." And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow anything by way of abatement, unless there be not sufficient without it.[m] Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come in more than sufficient to exhaust the *residuum* after the legacies paid.[n] And this law is as old as Bracton and Fleta, who tell us,[o] "*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.*"

Abatement of legacies.

[513]

Lapse.

If the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*, 'except that by statute 1 Vict. c. 26, s. 33, a gift to a child or other issue of the testator will not lapse in case of the death of the legatee, leaving issue which survives the testator, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.' And if a *contingent* legacy be left to any one, as *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy.[p] But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsenti*, although it be *solvendum in futuro;* and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law;[q] and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the Chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued.[r] But, if

[m] 2 Vern. 111.
[n] 2 Vern. 205.
[o] Bract. l. 2, c. 26; Flet. l. 2, c. 57, § 11.
[p] Dyer, 59; 1 Equ. Cas. Abr. 295.
[q] Ff. 35, 1, 1, & 2.
[r] 1 Eq. Cas. Abr. 295.

such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; unless there be something in the will to show an intention to the contrary,[s] as if there be a residuary devise. 'For by the Wills Act (1 Vict. c. 26, s. 25), unless a contrary intention appears by the will, such real estate or interest thereon as shall be comprised in a lapsed devise, or in a devise which fails as being contrary to law (as where given to a charity), or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.'[t] And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable [514] thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator,[u] 'the time allowed by law for the payment of legacies.'

Donations *mortis causâ.*

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property, which is called a donation *causâ mortis.* And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors, and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causâ.*[w] This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession,[x] 'without which the gift would be void,'[y] and so far differs from a testamentary disposition;

[s] 2 P. Wms. 601; Co. Litt. 237 *a;* Butl. note.

[t] 'This clause seems to leave untouched the question as to the destination of a lapsed charge upon an estate *specifically* devised—Is the specific devisee or the residuary devisee to have the benefit of the lapsed devise?' (Jarman on Wills, v. i p. 309.)

[u] 2 P. Wms. 26, 27.

[v] *Duffield* v. *Hicks,* 1 Bli. N. S. 497; *Gardner* v. *Parker,* 3 Madd. 184.

[w] Prec. Chanc. 269; *Drury* v. *Smith,* 1 P. Wms. 406, 441; 3 P. Wms. 357; *Blount* v. *Barrow,* 4 Br. Ch. c. 72; *Hill* v. *Hills,* 8 M. & W. 401.

[x] Law of Forfeit. 16.

[y] *Bunn* v. *Markham,* 7 Taunt. 224.

but seems to have been handed to us from the civil lawyers,[z] who themselves borrowed it from the Greeks.[a]

7. Residuary legatee, and statute of distributions.

7. When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship.[b] Though this was understood[c] with the restriction, that, although where the executor had no legacy at all, the *residuum* should in general be his own, yet wherever there was sufficient on the [515] face of a will (by means of a competent legacy or otherwise), to imply that the testator intended his executor should *not* have the residue, the undevised surplus of the estate should go to the next of kin. 'But now by statute 11 Geo. IV. & 1 Will. IV. c. 40, unless it appear by the will or codicil thereto, that the executor was intended to take beneficially, he shall be held to be but a trustee for the person entitled to the residue under the Statute of Distribution. So that' the executor stands upon exactly the same footing as an administrator, concerning whom indeed there formerly was much debate,[d] whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law.[e] And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for, by the statute 22 & 23 Car. II. c. 10, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestates' estates (except of

[z] Inst. 2, 7, 1; Ff. l. 39, t. 6.

[a] There is a very complete *donatio mortis causâ* in the Odyssey, b. 17, v. 78, made by Telemachus to his friend Piræus; and another by Hercules, in the Alcestis of Euripides, v. 1020.

[b] Perkins, 525.

[c] Prec. Chanc. 323; 1 P. Wms. 7, 544; 2 P. Wms. 338; 3 P. Wms. 43, 194; Stra. 559; *Lawson* v. *Lawson*, Dom. Proc. 28 Apr. 1777.

[d] Godolph. p. 2, c. 32.

[e] 1 Lev. 233; Cart. 125; 2 P. Wms. 447.

femes-covert, which are left as at common law),[f] shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: one-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives, that is, their lineal descendants; if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters.[g] The next of kindred, here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration; of whom we have sufficiently spoken. And therefore by this statute the mother, [516] as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or children, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

'And when relations are thus found who are distant from the intestate by an equal number of degrees, they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other; no difference in the distribution of personal property being made between the whole and the half blood, as has been already pointed out. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his personal property. There is only one exception to this rule, viz., where the nearest relations are a grandfather or grandmother, and brothers or sisters; although

[f] Stat. 29 Car. II. c. 3, § 25.

[g] Raym. 496; Lord Raym. 571.

all these are related in the second degree, yet the former shall not participate with the latter; for which singular exception it does not appear that any good reason can be given.'[h]

It is curious to observe how near a resemblance the Statute of Distributions bears to our ancient English law, *de rationibili parte bonorum*, spoken of at the beginning of this chapter; and which Sir Edward Coke[i] himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato*;[j] which, and because

[h] Except that "between brother and brother there is but one degree," 3 Atk. 762. See p. 214. A curious question was once agitated respecting the right to administration. General Stanwix and an only daughter were lost together at sea, and it was contended that it was a rule of the civil law, that when a parent and child perish together, and the priority of their deaths is unknown, it shall be presumed that the child survives the parent. And by this rule the right to the personal estate of the general would have vested in the daughter, and by her death in her next of kin, who on the part of the mother was a different person from the next of kin to her father. But this being only an application for the administration, and not for the interest under the statute of distributions, the court declined giving a judgment upon that question (1 Bl. R. 640). And it does not appear that that point was ever determined in the spiritual courts (see Fearne, Posth. W. p. 37; 1 You. & C. C. C. 121). In 6 East, 82, it is said that Lord Mansfield required the jury to find whether the general or his daughter survived; but it is not stated upon what occasion.—[CHRISTIAN.] 'In a recent case, when a husband and wife were drowned at sea, having been washed off the side of the ship by the same wave, and there was no direct evidence of the survivorship of either, it was held that there was no *presumption* in favour either of the survivorship of the husband or the wife, the medical evidence only amounting to a *probability* either way (*Underwood* v. *Wing*, 4 De G. MacN. & G. 633.' Some curious Cases *de Commorientibus* may be seen in Causes Célèbres, tom. 3, 412, *et seq.* 'By the civil law, where two persons died together, and there was no evidence which of them died first, the presumption was in favour of the younger having been the survivor, if he were *above* puberty, the elder being held to have been the survivor if the younger were *below* puberty (Ff. xxxiv. 5, 5; §. 22, 23). This rule is very precise, but quite inconsistent with what would probably take place; and accordingly, in framing the French Code, another rule was adopted, viz., that, failing all proof, the person above fifteen and under sixty years of age shall be held to survive those under fifteen or above sixty. The presumption can, of course, only be given effect to in the absence of *all* circumstances tending to show the facts. Thus, if two persons were to perish by shipwreck, and the vessel being discovered waterlogged, one body was found drowned in the hold and the other dead on the mast, the presumption would certainly be that he whose body was found in the hold perished first. In one case, when a father and son had been executed for sheepstealing, and it became important to discover who was the last survivor, evidence was given as to which showed signs of vitality longest on the scaffold.'

[i] 2 Inst. 33; see 1 P. Wms. 8.

[j] The general rule of such succes-

the Act was also penned by an eminent civilian,[k] has occasioned a notion that the parliament of England copied it from the Roman prætor; though, indeed, it is little more than a restoration, with some refinements and regulations, of our old constitutional law, which prevailed as an established right and custom from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So, likewise, there is another part of the Statute of Distributions, where directions are given that no child of the intestate (except his heir-at-law), on whom he settled in his lifetime any estate in lands, or pecuniary portion equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them by way of advancement are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision has been also said to be derived from the *collatio bonorum* of the imperial law,[1] which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this 'was' part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it has always been, and still is, the common law of England, under the name of *hotchpot*.

Hotchpot.

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Before I quit this subject, I must, however, acknowledge that the doctrine and limits of representation laid down in the Statute of Distributions seem to have been principally borrowed from the civil law; whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the common law knows no other rule of succession but that *per stirpes* only. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and

sions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood, or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38, 15, 1; Nov. 118, c. 1, 2, 3; 127, c. 1.)

[k] Sir Walter Walker. See *per* Holt, C. J., in *Rex* v. *Raines*, 1; Lord Raym. 574.

[1] Ff. 37, 6, 1.

not *jure representationis*, in the right of another person. As, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each; but, if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two, then the distribution must have been *per stirpes*, viz., one third to A.'s three children; another third to B.'s two children; and the remaining third to C., the surviving brother: yet, if C. had also been dead without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*, viz., each of them one-fifth part.[m]

Customs of London and York.

The Statute of Distributions expressly excepted and reserved the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising was removed by the statutes formerly mentioned, their ancient customs have remained in full force up to our own days with respect to the estates of intestates. 'But an Act of the last session of Parliament (19 & 20 Vict. c. 94) has now enacted that these special customs of distribution shall cease, and be at an end with reference to all persons dying after Dec. 31st, 1856, so that since that day, but one rule of distribution exists throughout the whole of England.'

'With regard to these customs' we may observe, that, in the city of London, and province of York (as well as in the kingdom of Scotland), and probably also in Wales (concerning which there is little to be gathered, but from the statute 7 & 8 Will. III. c. 38), the effects of the intestate, after payment of his debts, were in general divided according to the

[m] Prec. Chanc. 54. There is no representation or distribution *per stirpes* but among the immediate descendants of the intestate, and the children of his brothers and sisters; for the statute has expressly declared that no representation shall be admitted among collaterals, after brother's and sister's children (s. 7). If, therefore, A., the brother of the intestate, be dead, leaving only grandchildren, and B. be dead, leaving children, and C. still be living, the grandchildren of A. shall have no share, but one-half will be given to the children of B., and the other half to C. (1 P. Wms. 25). If the intestate has a mother living, and brother's or sister's children, they shall take *per stirpes* with the mother, who shall have in such case the same share as a brother or sister (1 Atk. 458). An aunt's child, or a cousin, cannot take by representation with an uncle, for as a nephew's child cannot take by representation, so a collateral equally remote shall not be admitted to take by representation with a nearer kinsman. (1 P. Wms. 594.) -- [CHRISTIAN.]

ancient universal doctrine of the *pars rationabilis*. If the deceased left a widow and children, his substance (deducting for the widow, her apparel, and the furniture of her bed-chamber, which in London was called the *widow's chamber*) was divided into three parts, one of which belonged to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they respectively, in either case, took one moiety, and the administrator the other; if neither widow nor child, the administrator had the whole. And this portion, or *dead man's* part, the administrator was wont to apply to his own use, till the statute 1 Jac. II. c. 17, declared that the same should be subject to the Statute of Distributions. So that if a man died worth 1800*l.* personal estate, leaving a widow and two children, this estate was divided into eighteen parts; whereof the widow had eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he left a widow and one child, she still had eight parts, as before; and the child had ten, six by the custom, and four by the statute: if he left a widow and no child, the widow had three-fourths of the whole, two by the custom and one by the statute; and the remaining fourth went by the statute to the next of kin. It is also to be observed, that, if the wife were provided for by a jointure before marriage, in bar of her customary part, it put her in a state of nonentity with regard to the custom only; but she was entitled to her share of the dead man's part under the Statute of Distributions, unless barred by special agreement. And if any of the children were advanced by the father, in his lifetime, with any sum of money (not amounting to their full proportionable part), they must have brought that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they were entitled to any benefit under the custom: but, if they were fully advanced, the custom entitled them to no farther dividend.

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Thus far in the main the customs of London and of York agreed; but, besides certain other less material variations, there were two principal points in which they considerably differed. One was, that in London the share of the children (or orphanage part) was not fully vested in them till the age of twenty-one; and if they died under that age, whether sole

or married, their share survived to the other children; but after the age of twenty-one, it was free from any orphanage custom, and in case of intestacy, fell under the Statute of Distributions. The other, that in the province of York, the heir at common law, who inherited any land, either in fee or in tail, was excluded from any filial portion or reasonable part. But, notwithstanding these provincial variations, the customs appear to have been substantially one and the same. And, as a similar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British origin; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs, though it is not improbable that the resemblances which remained 'until the recent statute,' were owing to the Roman usages, introduced in the time of Claudius Cæsar, who established a colony in Britain to instruct the natives in legal knowledge; inculcated and diffused by Papinian, who presided at York as *præfectus prætorio*, under the Emperors Severus and Caracalla, and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

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[APPENDIX.

APPENDIX.

No. I.

VETUS CARTA FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Williemus filius Willielmi de Segenho, dedi, concessi, et hac presenti cartâ meâ confirmavi, Johanni quondam filio Johannis de Saleford, pro quâdam summâ pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: HABENDAM ET TENENDAM totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: REDDENDO et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta; ET ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. IN CUJUS rei testimonium huic presenti carte sigillum meum apposui; HIIS testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eâdem villâ, et aliis. DATA apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

Premises.

Habendum, et Tenendum.

Reddendum.

Warranty.

Conclusion.

(L. S.)

MEMORANDUM, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford Johannis de Seybroke, et aliorum.

Livery of seisin indorsed.

No. II.

A CONVEYANCE BY LEASE AND RELEASE.

SECT. 1. LEASE, OR BARGAIN AND SALE, FOR A YEAR.

Premises. THIS INDENTURE, made the third day of September, in the year of our Lord one thousand eight hundred and nine, between Parties. Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, and Francis Golding, of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker, and Cecilia, his wife, Nominal consideration. in consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), and for other good causes and considerations them the said Abraham Barker and Cecilia his wife hereunto specially Bargain and sale. moving, HAVE bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, Parcels. and assigns, ALL that the capital messuage, called Dale Hall, in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or General words. known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof,

and of every part and parcel thereof: To HAVE AND TO HOLD *Habendum.* the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing and fully to be completed and ended: YIELDING and paying therefore unto the said Abraham *Reddendum.* Barker and Cecilia his wife, and their heirs and assigns, the yearly rent of one peppercorn at the expiration of the said term, if the same shall be lawfully demanded: TO THE INTENT Intent. and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses and upon the trusts thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. IN WITNESS Conclusion. whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered, in the presence of
George Carter.
William Browne.

Abraham Barker. (L.S.)
Cecilia Barker. (L.S.)
David Edwards. (L.S.)
Francis Golding. (L.S.)

SECT. 2. DEED OF RELEASE.

THIS INDENTURE of five parts, made the fourth day of Premises. September, in the year of our Lord one thousand eight hundred and nine, between Abraham Barker, of Dale Hall, in Parties. the county of Norfolk, esquire, and Cecilia his wife, of the first part; David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards, of Cowbridge, in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding, of

the city of Norwich, clerk, of the second part; Charles Browne, of Enstone, in the county of Oxford, gentleman, and Richard More, of the city of Bristol, merchant, of the third part; John Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. WHEREAS a marriage is intended, by the permission of God, to be shortly had and solemnized between the said John Barker and Katherine Edwards: NOW THIS INDENTURE WITNESSETH, that in consideration of the said intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker (by and with the consent and agreement of the said John Barker and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents), by the said David Edwards in hand paid at or before the sealing and delivery hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, the said Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker, her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments hereinafter mentioned, and to such uses, and upon such trusts as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings, of lawful money of Great Britain, to the said Abraham Barker and Cecilia his wife in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the sealing and delivery hereof (the several receipts whereof are hereby respectively acknowledged), they the said Abraham Barker and Cecilia his wife, HAVE and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis

Recital.

Consideration.

Nominal consideration.

Release.

Golding, their heirs and assigns, ALL that the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's Farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made to the said Abraham Barker and Cecilia his wife, for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession); and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: TO HAVE AND TO HOLD the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John

Parcels.

General words

Mention of bargain and sale.

Habendum.

To the use of the grantors till marriage.

Then of the husband for life, *sans waste:*

Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life to receive and take the rents and profits thereof and of every part thereof to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can, or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the

Remainder to trustees to preserve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower.

Remainder to other trustees for a term, upon trusts after mentioned:

Remainder to the first and other sons of the marriage in tail.

body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them (if more than one), share and share alike, as tenants in common, and not as as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever. And as to, for, and concerning the term of five hundred years hereinbefore limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son, and one or more other child or children of the said John Barker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further

Remainder to the daughters,

as tenants in common, in tail;

Remainder to the husband in tail:

Remainder to the husband's mother in fee.

The trust of the term declared;

to raise portions for younger children.

Payable at certain times,

with maintenance at the rate of 4 per cent.

trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions, after the rate of four pounds in the hundred yearly. PROVIDED always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. PROVIDED also, that in case there shall be no such child or children of the said John Barker, on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in any wise notwithstanding. PROVIDED also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession in some convenient place or places within

and benefit of survivorship.

If no such child,

or if all die,

or if the portions be raised,

or paid,

or secured by the person next in remainder;

the residue of the term to cease.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.

the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates hereinbefore limited, expressed and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever; and to and for no other use, intent, or purpose whatsoever; anything herein contained to the contrary thereof in anywise notwithstanding. AND for the considerations aforesaid, and for barring all estates-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his Majesty's justices of the Court of Common Pleas at Westminster, one or more fine or fines, sur cognizance de droit, come ceo, &c., with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities,

Covenant to levy a fine;

qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner levied and acknowledged, or to be levied and acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his Majesty's high Court of Chancery one or more writ or writs of entry sur disseisin en le post, returnable before his Majesty's justices of the Court of Common Pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear gratis, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also gratis appear in their proper persons, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default; so as judgment shall and may be thereupon had and given for the said Francis Golding to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded, and had accordingly,

In order to make a tenant to the præcipe that a recovery may be suffered;

and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. AND it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines, so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered or executed, or hereafter to be had, made, levied, suffered or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements hereinbefore mentioned, expressed, and declared, of and concerning the same. AND the said Abraham Barker, party hereunto, doth hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, hereinbefore mentioned, expressed, and declared of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for

to enure

to the previously declared uses in this deed.

Other covenants;

for quiet enjoyment.

free from incumbrances;

him, her, them, or any of them; or from, by, or under, his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their acts, means, assent, consent or procurement; AND MOREOVER, that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required; so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making

and for further assurance.

or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. PROVIDED LASTLY, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, anything herein contained to the contrary thereof in anywise notwithstanding.

Power of revocation.

IN WITNESS whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Conclusion.

Sealed and delivered, in the presence of	Abraham Barker.	(L. S.)
George Carter.	Cecilia Barker.	(L. S.)
William Browne.	David Edwards.	(L. S.)
	Francis Golding.	(L. S.)
	Charles Browne.	(L. S.)
	Richard More.	(L. S.)
	John Barker.	(L. S.)
	Katherine Edwards.	(L. S.)

No. III.

A FINE OF LANDS SUR COGNIZANCE DE DROIT, COME CEO, &c.

SECT. I. WRIT OF COVENANT; OR PRÆCIPE.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. COMMAND Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages,

two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of saint Michael in one month, to show wherefore they have not done it: and have you there the summoners, and this writ. WITNESS ourself at Westminster the ninth day of October, in the forty-ninth year of our reign.

Sheriff's return.

Pledges of prosecution,	John Doe. Richard Roe,	Summoners of the within named Abraham, Cecilia, and John,	John Den. Richard Fen.

SECT. 2. THE LICENCE TO AGREE.

Norfolk, to wit. } DAVID EDWARDS, esquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances in Dale.

SECT. 3. THE CONCORD.

AND THE AGREEMENT IS SUCH, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quit-claimed, from them and their heirs, to the aforesaid David and his heirs for ever. And further the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 4. THE NOTE OR ABSTRACT.

Norfolk, to wit. } BETWEEN David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them: to wit, that the said Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quit claimed, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 5. THE FOOT, CHIROGRAPH, OR INDENTURES OF THE FINE.

Norfolk, to wit. } THIS IS THE FINAL AGREEMENT, made in the court of the lord the king at Westminster, from the day of saint Michael in one month, in the forty-ninth year of the reign of the lord GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quit-

claimed, from them and their heirs, to the aforesaid David, and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

Sect. 6. Proclamations, endorsed upon the Fine, according to the Statutes.

The first proclamation was made the sixteenth day of November, in the term of Saint Michael, in the fiftieth year of the king within-written.

The second proclamation was made the fourth day of February, in the term of Saint Hilary, in the fiftieth year of the king within-written.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the fiftieth year of the king within-written.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the fiftieth year of the king within-written.

No. IV.

A COMMON RECOVERY OF LANDS WITH DOUBLE VOUCHER.

Sect. 1. Writ of Entry sur Disseisin in the Post; or Præcipe.

George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. Command David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and

into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security for prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to show wherefore he hath not done it; and have you there the summoners, and this writ. WITNESS ourself at Westminster, the twenty-ninth day of October, in the fiftieth year of our reign.

Pledges of prosecution,	John Doe, Richard Roe.	Summoners of the within named David,	John Den. Richard Fen.	Sheriff's return.

SECT. 2. EXEMPLIFICATION OF THE RECOVERY ROLL.

GEORGE the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to all to whom these our present letters shall come greeting. KNOW YE, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael, in the fiftieth year of our reign, upon the fifty-second roll it is thus contained. ENTRY returnable on the octave of Saint Martin. NORFOLK, to wit; Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value of six shillings and eight pence, and more, in rents, corn and grass: and into which the said David hath not entry, unless as aforesaid: and thereupon he bringeth suit and good proof. AND the said David in his proper person comes and defendeth his right, when and where it shall behove him, and thereupon voucheth to warranty John Barker, esquire; who is present here in court in his proper person, and the tene-

Return. Demand against the tenant. Count. Esplees. Defence of the tenant. Voucher. Warranty.

ments aforesaid with the appurtenances to him freely warranted, and prays that the said Francis may count against him.

Demand against the vouchee.

AND hereupon the said Francis demandeth against the said John, tenant by his own warranty, the tenements aforesaid with the appurtenances, in form aforesaid, &c.

Count.

And whereupon he saith, that he himself was seised of the tenements aforesaid with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c.

Defence of the vouchee.

AND the aforesaid John, tenant by his own warranty, defends his right, when, &c. and thereupon he further voucheth to warranty Jacob Morland;

Second voucher.

who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c.

Warranty.

Demand against the common vouchee.

AND hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c.

Count.

And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c.

Defence of the common vouchee.

AND the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c.

Plea, *nul disseisin.*

And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country.

Imparlance.

AND THE aforesaid Francis thereupon craveth leave to imparl; and he hath it.

Default of the common vouchee.

And afterwards the aforesaid Francis cometh again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default.

Judgment for the demandant.

THEREFORE IT IS CONSIDERED, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid John, to the value of the tenements aforesaid;

Recovery in value.

and further, that the said John, have of the land of the said Jacob to the value of the tenements aforesaid.

Amercement.

And the said Jacob in mercy. AND hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the

twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely Sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid, to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded. ALL AND SINGULAR which premises, at the request of the said Francis, by the tenor of these presents we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. WITNESS Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the fiftieth year of our reign.

Award of the writ of seisin, and return.

Exemplification continued.

Teste.

COOKE.

No. V.

AN OBLIGATION, OR BOND, WITH CONDITION FOR THE PAYMENT OF MONEY.

KNOW ALL MEN by these presents, that I David Edwards of Lincoln's Inn in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the first day of April in the year of our Lord one thousand eight hundred and nine.

Obligation.

THE CONDITION of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the first day of October next ensuing the date of the above written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Condition.

Sealed, and delivered, in the presence of
George Carter of

David Edwards. (L.S.)

No. VI.

DISENTAILING DEED.

Parties

THIS INDENTURE, made the 14th day of February, 1846, between John Barker of Dale Hall, of the county of Norfolk, esquire, of the first part; George Barker, esquire, the eldest son and heir apparent of the said John Barker, of the second part; and William Scott of Lincoln's Inn in the county of Middlesex, gentleman, of the third part: WHEREAS by an Indenture of Release, dated on or about the 4th day of September, 1809, grounded on a lease for a year, and expressed to be made between Abraham Barker, esquire, and Cecilia his wife, of the first part, David Edwards, esquire, and Francis Golding, clerk, of the second part, Charles Browne, gentleman, and Richard More, merchant, of the third part, the said John Barker of the fourth part, and Katherine Edwards, spinster, of the fifth part, being the settlement made previously to and in contemplation of the marriage, which was afterwards duly had and solemnized between the said John Barker and the said Katherine Edwards: The capital messuage lands, tenements, and hereditaments, hereinafter described or referred to, and intended to be hereby granted, were, with the appurtenances, settled, conveyed, and assured from and after the solemnization of the said marriage, to the use of the said John Barker for the term of his natural life, without impeachment of waste, and after the determination of that estate, to the use of the said David Edwards and Francis Golding, and their heirs during the life of the said John Barker, upon trust, to preserve contingent remainders, and subject thereto, in trust for the said John Barker and his assigns; and after the decease of the said John Barker to the use of the said Katherine Edwards for her natural life, in lieu of dower, and after her decease or sooner determination of that estate to the use of the said Charles Browne and Richard More, their executors, administrators, and assigns, for the term of five hundred years, upon the trusts thereinafter mentioned, and after the determination of the said term and subject thereto, To the use of the first son of the said John Barker and the body of the said Katherine Edwards, afterwards Katherine Barker, to be begotten, and of the heirs of the body of such first son lawfully issuing with divers remainder over. AND WHEREAS the said George Barker is the first son of the said John Barker on the body of the said Katherine Barker

Recital of Settlement, &c.

begotten, and attained his age of twenty-one years on the 9th day of September, 1831. AND WHEREAS the said George Barker is desirous of barring the said estate tail, and every other estate tail (if any) of him the said George Barker in the said capital messuage, lands, tenements and hereditaments, and all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination, or in defeasance of the said estate tail, and of every other estate tail (if any) of him the said George Barker in the premises, and of limiting the same premises to the use of him, his heirs, and assigns. AND WHEREAS the said John Barker, as protector of the said settlement, has consented thereto. NOW THIS INDENTURE WITNESSETH, that for effectuating the said desire, he, the said George Barker, with the consent of the said John Barker (testified by his executing these presents), Doth hereby grant unto the said William Scott and his heirs All that the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, and all those lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, farm-buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, yearly and other rent issues and profits thereof, and every part and parcel thereof, and ALL the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of him the said George Barker in to out of or upon the premises.

Testatum.

Parcels

General words.

To have and to hold the said premises (subject and without prejudice to the previous life estates of the said John Barker and Katherine Barker, and the powers and privileges thereunto annexed, and to the said term of five hundred years and the trusts thereof) unto the said William Scott and his heirs, to the use of the said George Barker, his heirs and assigns, for ever.

Habendum.

In witness, &c.

No. VII.

DEED OF GRANT AND CONVEYANCE IN FEE BY A VENDOR SEISED IN FEE, HIS WIFE RELEASING HER DOWER.

Parties

THIS INDENTURE, made 4th day of June, 1845, between Thomas Hughes, of the parish of Dale, in the county of Warwick, esquire, and Jane Hughes, his wife, of the one part, and William Sutton, of the same place, esquire, a bachelor, of the other part, WITNESSETH, that in consideration of the sum of five hundred pounds to the said Thomas Hughes, this day paid by the said William Sutton, for the purchase of the hereditaments intended to be hereby granted (the receipt whereof the said Thomas Hughes doth hereby acknowledge), he the said Thomas Hughes doth hereby grant, and she the said Jane Hughes,[a] for the purpose of releasing her right of dower, and with the concurrence of the said Thomas Hughes, doth hereby release unto the said William Sutton, his heirs and assigns, All that messuage or tenement commonly called or known by the name of Holt's Place, in the parish of Dale, in the county of Warwick aforesaid, together with twelve acres of land thereto adjoining, late in the occupation of Mary Hughes, deceased, and which said messuage and hereditaments are described and delineated more particularly in the plan in the margin of these presents; Together with all commons, ways, lights, sewers, watercourses, rights, privileges, easements, commodities, and appurtenances whatsoever, to the said hereditaments, or any part thereof, belonging or appertaining, or with the same or any part thereof now or heretofore held, used, or enjoyed, or reputed as part or member thereof, or appurtenant thereto; And all the estate and interest of the said Thomas Hughes and Jane Hughes, in the said premises, and every part thereof; To hold the said premises unto the said William Sutton, his heirs and assigns, To the use of the said William Sutton, his heirs and assigns. And it is hereby declared, that no widow of the said William Sutton shall be entitled to dower out of the said premises. And the said Thomas Hughes doth hereby for himself, his heirs, executors, and administrators, covenant with the said William Sutton, his heirs and assigns, that,

Parcels.

General words.

Habendum.

Declaration against dower.

Covenants for title,

[a] It is supposed that Jane Hughes was married previous to Jan. 1, 1834 The deed must be acknowledged by her under statute 3 & 4 Will. IV. c. 74.

notwithstanding any act, deed, or thing by the said Thomas Hughes or any of his ancestors, made or done, or knowingly permitted or suffered, they the said Thomas Hughes and Jane Hughes now have power to grant and release the said premises unto and to the use of the said William Sutton, his heirs and assigns, free from incumbrances; And that he the said Thomas Hughes and his heirs, and all other persons lawfully or equitably claiming through or in trust for him or any of his ancestors, will at all times, at the cost of the said William Sutton, his heirs or assigns, do and execute all such acts and assurances, for further or better assuring all or any of the said premises to the use of the said William Sutton, his heirs and assigns, as by him or them shall be reasonably required.

and further assurance.

In witness, &c.

No. VIII.

DEED OF APPOINTMENT AND GRANT.

This Indenture, made the 13th day of May, 1840, between George Green, of the City of Chester, Esquire, of the one part, and Thomas Hughes, of the parish of Dale in the county of Warwick, esquire, of the other part. Whereas, by an indenture dated the 7th day of October, 1835, and expressed to be made between Peter Parlett of the first part, the said George Green of the second part, and Elijah Evans of the third part, the hereditaments intended to be hereby appointed and granted, were limited to such uses, upon and for such trusts, interests, and purposes, and with, under, and subject to such powers, provisoes, and declarations as the said Thomas Hughes should, by any deed or deeds, direct, limit, or appoint; and in default of, and until and subject to, any such direction and appointment, to the use of the said George Green and his assigns for his life, with remainder to the use of the said Elijah Evans and his heirs during the life of the said George Green, in trust for him and his assigns, with remainder to the use of the said George Green, his heirs and assigns. And whereas the said Thomas Hughes has contracted with the said George Green for the purchase of the said hereditaments, and the inheritance thereof in fee-simple in possession, free from incumbrance, at the price of three hundred pounds. Now this Indenture witnesseth, that, in pursuance of the said con-

Parties.

Recital of deed creating the power.

Recital of contract for purchase.

tract, and in consideration of the sum of three hundred pounds to the said George Green, this day paid by the said Thomas Hughes (the receipt whereof the said George Green doth hereby acknowledge), he, the said George Green, in exercise of the said power given him by the said indenture of the 7th day of October, 1835, as aforesaid, and of every other power enabling him in this behalf, doth hereby direct, limit, and appoint, that all those the pieces or parcels of land and hereditaments hereinafter mentioned, and intended to be hereby granted, with the appurtenances as hereinafter mentioned, shall henceforth go and remain to the use of the said Thomas Hughes, his heirs and assigns. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said contract, and for the consideration aforesaid, he the said George Green, doth hereby grant unto the said Thomas Hughes, his heirs and assigns, all these pieces or parcels of lands and hereditaments situate in the parish of Hope, in the county of Warwick aforesaid, delineated in the plan in the margin of these presents, and specified in the schedule hereunder written, together with all commons, ways, watercourses, rights, privileges, easements, commodities, and appurtenances whatsoever, to the said hereditaments, or any part thereof belonging or appertaining, or with the same or any part thereof now or heretofore held on or enjoyed or reputed as part or member thereof or appurtenant thereto. AND all the estate and interest of the said George Green in the said premises and every part thereof. To hold the said premises unto the said Thomas Hughes, his heirs and assigns, to the use of the said Thomas Hughes, his heirs and assigns. And it is hereby declared, that no widow of the said Thomas Hughes shall be entitled to dower of the said premises. And the said George Green doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Thomas Hughes, his heirs and assigns, that, notwithstanding any act, deed, or thing by the said George Green made or done, or knowingly permitted or suffered, he the said George Green, now hath full power to appoint and grant the said premises to the use of the said Thomas Hughes, his heirs and assigns, free from incumbrance; And that he the said George Green and his heirs, and all other persons lawfully or equitably claiming through or on trust for him, will, at all times, at the cost of the said Thomas Hughes, his heirs and assigns, do and execute all such acts and assurances, for further or better assuring all or any of the said premises to

E. of the power of appointment.

Grant.

Covenant for power to appoint, &c.

the use of the said Thomas Hughes, his heirs and assigns, as by him or them shall be reasonably required.

In witness, &c.

No. IX.

COVENANT TO SURRENDER COPYHOLDS TO A PURCHASER.

THIS INDENTURE, made the 9th day of July, 1850, between Henry Hall, of Dale, in the county of Warwick, gentleman, of the one part, and Thomas Hughes, of the same place, esquire, of the other part, witnesseth, that, in consideration of the sum of three hundred and fifty pounds to the said Henry Hall, this day paid by the said Thomas Hughes, for the purchase of the hereditaments hereinafter covenanted to be surrendered, (the receipt whereof the said Henry Hall doth hereby acknowledge), he the said Henry Hall doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Thomas Hughes and his heirs, that the said Henry Hall, or his heirs, and all other necessary parties (if any), will, at or before the next court for the manor of Dale, in the county of Warwick aforesaid, well and effectually surrender into the hands of the lord of the said manor, according to the custom thereof, All those the messuages, pieces or parcels of land and hereditaments, situate in the parish of Dale, in the county of Warwick, delineated in the plan in the margin of these presents, and specified in the schedule hereunder written, all which messuages, pieces or parcels of land and hereditaments are in the court rolls of the said manor described as follows: (that is to say), [*description from the rolls*], together with all commons, ways, lights, sewers, watercourses, rights, privileges, easements, commodities, and appurtenances whatsoever, to the said hereditaments or any part thereof belonging or appertaining or with the same or any part thereof, now or heretofore held, used, or enjoyed, or reputed as part or member thereof, or appurtenant thereto, TO THE USE of the said Thomas Hughes, his heirs and assigns, according to the custom of the said manor, and by and under the accustomed rents, fines, heriots, suits, and services. And the said Henry Hall doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Thomas Hughes, his

Covenant to surrender.

Uses of surrender.

heirs and assigns, that, notwithstanding any act, deed, or thing by the said Henry Hall, or any of his ancestors, made or done, or knowingly permitted or suffered, he the said Henry Hall now hath power to surrender the said premises to the use of the said Thomas Hughes, his heirs and assigns, in manner aforesaid, free from incumbrances; And that he the said Henry Hall, and his heirs, and all other persons lawfully or equitably claiming through or in trust for him or any of his ancestors, will, at all times, at the cost of the said Thomas Hughes, his heirs or assigns, do and execute all such acts and assurances for further or better assuring all or any of the said premises to the use of the said Thomas Hughes, his heirs and assigns, as by him or them shall be reasonably required.

In witness, &c.

SURRENDER OUT OF COURT BY HENRY HALL TO THOMAS HUGHES A PURCHASER IN FEE.

Memorandum of surrender.

THE MANOR OF DALE in the county of Warwick } Be it remembered that on the 12th day of July, 1850, Henry Hall, of Dale, gentleman, one of the customary tenants of the said manor, came before John Stiles, steward of the said manor, and for carrying into effect a contract made and entered into by the said Henry Hall with Thomas Hughes of Dale, aforesaid, esquire, for the sale to him of the copyhold hereditaments hereinafter described, and the customary fee-simple and inheritance thereof, and in consideration of the sum of three hundred pounds unto the said Henry Hall, paid by the said Thomas Hughes previous to the making of this surrender, Did out of court surrender into the hands of the lord of the said manor, by the hands and acceptance of the said steward by the rod, according to the custom of the said manor, All &c., with the appurtenances to the same premises belonging, or in anywise appertaining (to which said hereditaments and premises the said Henry Hall was admitted at a general court holden for the said manor on the 5th day of April, 1830), and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, benefit, power, claim, and demand whatsoever, of the said Henry Hall in, to, or out of the said hereditaments and premises, and every part thereof, TO THE

USE of the said Thomas Hughes, his heirs and assigns for ever, according to the custom of the said manor.

HENRY HALL.

Taken and accepted the said 12th
day of July, 1850, by me

JOHN STILES, Steward of the said Manor.

PRESENTMENT OF THE ABOVE SURRENDER, AND ADMITTANCE OF THOMAS HUGHES.

THE MANOR OF DALE IN THE COUNTY OF WARWICK. } A General Court Baron of Hugh Jones, Lord of the said Manor, holden in and for the said manor, on the 12th day of August, in the year of Our Lord 1850, Before John Stiles, Steward of the said Manor.

Presentment.

AT THIS COURT the Homage present that on the 12th day of July, 1850, Henry Hall of Dale, aforesaid, gentleman, came before the said steward, and for carrying into effect a contract made and entered into by the said Henry Hall with Thomas Hughes, of Dale aforesaid, esquire, for the sale to him of the copyhold hereditaments hereinafter described, and the customary fee-simple and inheritance thereof, and in consideration of the sum of three hundred pounds unto the said Henry Hall, paid by the said Thomas Hughes previous to the making the same surrender, did out of court surrender into the hands of the lord of this manor, by the hands and acceptance of the said steward by the rod, according to the custom of this manor. All, &c., with the appurtenances to the same premises belonging, or in anywise appertaining (to which said hereditaments and premises the said Henry Hall was admitted at a court holden in and for this manor on the 5th day of April, 1830) and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, benefit, power, claim, and demand whatsoever, of the said Henry Hall in, to, or out of the said hereditaments and premises, and every part thereof to the use of the said Thomas Hughes, his heirs and assigns for ever, according to the custom of this manor.

Memorandum of admittance.

Now at this Court comes the said Thomas Hughes, and prays to be admitted to the said hereditaments and premises so surrendered to his use by the said Henry Hall as aforesaid, to which said Thomas Hughes, the lord of the manor, by the said steward, grants seisin thereof by the rod TO HAVE

And to Hold the said customary or copyhold hereditaments and premises, with their appurtenances, unto the said Thomas Hughes and his heirs, to be holden of the lord by copy of court roll at the will of the lord, according to the custom of this manor, by fealty, suit of court, and the ancient annual rent or rents, and other duties and services therefor due, and of right accustomed; and so (saving the right of the lord) the said Thomas Hughes is admitted tenant thereof, and pays to the lord for a fine on such his admittance the sum of ninety pounds, and his fealty is respited.

No. X.

MORTGAGE IN FEE, WITH POWER OF SALE.

This Indenture, made the 3rd day of August, 1856, between Thomas Hughes, of the parish of Dale, in the county of Warwick, esquire, of the one part, and James Smith, of the same place, gentleman, of the other part, Witnesseth, that in consideration of the sum of two hundred pounds this day paid to the said Thomas Hughes by the said James Smith, (the receipt whereof the said Thomas Hughes doth hereby acknowledge), he the said Thomas Hughes doth hereby, for himself, his heirs, executors, and administrators, covenant with the said James Smith, his executors and administrators, that the said Thomas Hughes, his heirs, executors, or administrators, will pay unto the said James Smith, his executors, administrators, or assigns, the sum of two hundred pounds, with interest for the same in the meantime at the rate of five pounds per cent. per annum, on the 3rd day of February next, without any deduction or abatement whatsoever. And this Indenture also witnesseth, that, for the consideration aforesaid, he the said Thomas Hughes doth hereby grant unto the said James Smith, his heirs and assigns, All that messuage or tenement called Holt's Place, situate at Dale, in the county of Warwick aforesaid, together with twelve acres of land adjoining thereto, all which hereditaments are delineated in the plan in the margin of these presents, Together with, &c., and all the estate, &c. To hold the said premises unto the said James Smith, his heirs and assigns, To the use of the said James Smith, his heirs and assigns. Provided always, that, if the said Thomas Hughes, his heirs, executors, adminis-

Covenant to pay the money lent.

Grant of the land.

Proviso for redemption.

trators, or assigns, shall pay unto the said James Smith, his executors, administrators, or assigns, the said sum of two hundred pounds, together with interest for the same in the meantime, at the rate of five pounds per cent. per annum, on the said 3rd day of February next, without any deduction or abatement whatsoever; then the said James Smith, his heirs or assigns, will, at any time thereafter, upon the request and at the cost of the said Thomas Hughes, his heirs, executors, administrators, or assigns, reconvey the said premises unto the said Thomas Hughes, his heirs and assigns, or as he or they shall direct, free from incumbrances by the said James Smith, his heirs, executors, administrators, or assigns. And the said Thomas Hughes doth hereby, for himself, his heirs, executors, and administrators, covenant with the said James Smith, his executors and administrators, that if the said sum of two hundred pounds, or any part thereof, shall remain unpaid after the said 3rd day of February next, he the said Thomas Hughes, his heirs, executors, administrators, or assigns, will, so long as the same sum, or any part thereof, shall remain unpaid, pay to the said James Smith, his executors, administrators, or assigns, interest for the said sum of two hundred pounds, or for so much thereof as shall for the time being remain unpaid, at the rate of five pounds per cent. per annum, by equal half-yearly payments, on the 3rd day of August and the 3rd day of February, without any deduction or abatement whatsoever. And the said Thomas Hughes doth hereby, for himself, his heirs, executors, and administrators, covenant with the said James Smith, his heirs and assigns, that he the said Thomas Hughes, now hath power to grant the said premises unto and to the use of the said James Smith, his heirs and assigns, in manner aforesaid, free from incumbrances: And that he, the said Thomas Hughes, and his heirs, and all other persons lawfully or equitably claiming any estate or interest in the premises, will at all times, at the request of the said James Smith, his heirs, executors, administrators, or assigns, but at the cost of the said Thomas Hughes, his heirs, executors, or administrators, do and execute all such acts and assurances for further or better assuring all or any of the said premises to the use of the said James Smith, his heirs and assigns, in manner aforesaid, as by him or them shall be reasonably required. Provided nevertheless, that it shall be lawful for the said Thomas Hughes, his heirs and assigns, to hold all the said premises until default shall be made in payment of the said sum of

Covenant to pay interest.

Covenant for title.

Mortgagee to hold till default.

two hundred pounds or the interest thereon, or some part thereof respectively, contrary to the aforesaid proviso for payment of the same, without any interruption by the said James Smith, or any person lawfully or equitably claiming through him. And it is hereby declared, that, if default shall be made in payment of the said sum of two hundred pounds or the interest thereon, or any part thereof respectively, on the 3rd day of February next, it shall be lawful for the said James Smith, his executors, administrators, or assigns, at any time or times thereafter, without any further consent on the part of the said Thomas Hughes, his heirs or assigns, to sell the said premises, or any part thereof, either together or in parcels, and either by public auction or private contract, with full power to buy in or rescind any contract for sale, and to resell without being responsible for any loss which may be occasioned thereby; And to do and execute all such acts and assurances for effectuating any such sale as the said James Smith, his executors, administrators, or assigns, shall think fit; And that, upon a sale by any person or persons who may not be seised of the legal estate, the person in whom the legal estate shall be vested, shall do and execute such acts and assurances for conveying the sale into effect as the person or persons by whom the sale shall be made shall direct. Provided nevertheless, that the said James Smith, his executors, administrators, or assigns, shall not execute the power of sale hereinbefore contained until he or they shall have given to the said Thomas Hughes, his heirs, executors, and administrators, or assigns, or left on the said premises, a notice in writing to pay off the monies for the time being owing on the security of these presents, and default shall have been made in such payment for six calendar months after giving or leaving such notice, or until some half-yearly payment of interest or a part of some such half-yearly payment shall have become in arrear for three calendar months: Provided also, that, upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether either of the cases mentioned in the clause lastly hereinbefore contained has happened, nor whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale; and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly. And it is hereby declared, that the receipt

Power of sale.

Proviso not to sell without notice.

Purchasers not bound by irregularity of sale.

of the said James Smith, his executors, administrators, or assigns, for the purchase-monies of the premises sold, or any part thereof, shall effectually discharge the purchaser or purchasers therefrom, and from being concerned to see to the application thereof, or being accountable for the non-application or misapplication thereof. And it is hereby declared, that the said James Smith, his executors, administrators, and assigns, shall hold the monies to arise from any sale in pursuance of the aforesaid power, upon trust, in the first place, thereout to pay all the expenses incurred in such sale, or otherwise in relation to the premises; And, in the next place, to apply such monies in or towards satisfaction of the monies for the time being, owing to the security of these presents; And then to pay the surplus (if any) of the monies arising from such sale to the said Thomas Hughes, his heirs or assigns: Provided always, that the said James Smith, his executors, administrators, or aasigns, shall not be answerable for any involuntary losses which may happen in the exercise of the aforesaid power and trusts, or any of them.

Trusts of sale-monies.

In witness, &c.

No. XI.

LEASE.

THIS INDENTURE, made the 10th day of October, 1843, between John Thompson, of No. 3 Princes Street, in the city of Westminster, of the one part, and Enoch Humfreys, of No. 4 Duke Street, in the city of London, of the other part, Witnesseth, that the said John Thompson doth hereby demise unto the said Enoch Humfreys, his executors, administrators, and assigns, all that dwelling-house numbered 4, in Duke Street, in the city of London aforesaid, with the yards, out-buildings, and ground, held therewith, as the same are delineated in the plan in the margin of these presents, and therein coloured green, together with all ways, lights, sewers, watercourses, rights, privileges, easements, advantages, and appurtenances thereto belonging, or usually held or enjoyed therewith, to hold the said premises unto the said Enoch Humfreys, his executors, administrators, and assigns, for the term of forty years from the date of these presents, rendering therefor, during the said term, the yearly rent of thirty pounds, clear of all present and future rates, taxes, and deductions, by equal payments on the 10th day of April and

the 10th day of October in every year, the first of such half-yearly payments to be made on the 10th day of April next.

Covenants of lessee.

And the said Enoch Humfreys doth hereby for himself, his heirs, executors, and administrators, covenant with the said John Thompson, his heirs and assigns, that he the said Enoch Humphreys, his executors, administrators, or assigns, during the said term, will pay the yearly rent hereinbefore reserved, on the days and in manner aforesaid. And will bear and pay all rates, taxes, and outgoings, now payable or hereafter to become payable, whether by the landlord or tenant in respect to the said premises. And will keep the said premises insured against loss or damage by fire in such office as the said John Thompson, his heirs or assigns, shall approve; and will, when required, produce the policy of such assurance, and the current year's receipt for the premium thereon, to the said John Thompson, his heirs or assigns. And will keep the said premises in good condition and complete repair, and without any alteration except such as the said John Thompson, his heirs or assigns, shall approve of. And at the expiration or sooner determination of the said term, shall yield up the same unto the said John Thompson, his heirs or assigns. And that the said John Thompson, his heirs and assigns, and his and their agents, surveyors, and workmen may, at all reasonable times during the said term, enter upon the said premises to inspect the same. And that no offensive business or occupation, or nuisance shall be carried on or committed on the said premises, and that the same shall be used as a private dwelling-house only. And that the said Enoch Humfreys, his executors, administrators, or assigns, will not assign or under-let the said premises without the consent in writing of the said John Thompson, his heirs or assigns.

Proviso of re-entry.

Provided always, that on any breach or non-observance of any of the covenants hereinbefore contained, the said John Thompson, his heirs and assigns, may re-enter upon the said premises, and re-possess and hold the same as if this demise had not been made. And the said John Thompson doth hereby for himself, his heirs, executors, administrators, and assigns,

Covenant for quiet enjoyment.

covenant with the said Enoch Humfreys, his executors, administrators, and assigns, that he and they performing and observing all the covenants hereinbefore contained, may hold and enjoy the said premises during the said term without any interruption by the said John Thompson, his heirs and assigns, or any person lawfully claiming under him or them.

In witness, &c.

No. XII.

ASSIGNMENT OF LEASE.

THIS INDENTURE, made the 9th day of August, 1853, between Enoch Humfreys, of No. 7 Duke Street, in the city of London, of the one part, and Stephen Buck, of the parish of Dale, draper, of the other part. Whereas, by an indenture of lease, dated the 10th day of October, 1843, and expressed to be made between John Thompson, esquire, of the one part, and the said Enoch Humfreys of the other part; All that dwelling-house numbered 7 in Duke Street, in the City of London, aforesaid, with the appurtenances, were demised to the said Enoch Humfreys, his executors, administrators, and assigns, for the term of forty years, from the 10th day of October, 1843, at the yearly rent of thirty pounds, and subject to certain covenants and conditions therein contained, and by the lessee, his executors, administrators, and assigns, to be observed and performed. And whereas the said Enoch Humfreys hath contracted with the said Stephen Buck for the sale to him, at the price of £200, of the premises aforesaid, for the residue of the said term, and subject to the rent, covenants, and conditions aforesaid, but free from all other incumbrances. Now this Indenture witnesseth, that, in pursuance of the said contract, and in consideration of the sum of £200, to the said Enoch Humfreys, this day paid by the said Stephen Buck, (the receipt whereof the said Enoch Humfreys doth hereby acknowledge,) he the said Enoch Humfreys doth hereby assign unto the said Stephen Buck, his executors, administrators, and assigns, all that the said dwelling-house and premises by the said indenture of the 10th day of October, 1843, expressed to be demised, with their rights, easements, and appurtenances; and all the estate and interest of the said Enoch Humfreys, in the said premises, and every part thereof, To hold the said premises unto the said Stephen Buck, his executors, administrators, and assigns, for the residue of the said term of forty years, at the rent, and subject to the covenants and conditions in the said lease reserved and contained, and henceforth by the lessee, his executors, administrators, and assigns, to be paid, observed, or performed. And the said Enoch Humfreys doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Stephen Buck, his executors, administrators, and assigns, that the rent, covenants, and conditions, in the

Recital of Lease.

Assignment of Lease.

Covenants by Assignor.

said lease reserved and contained, and by the lessee, his executors, administrators, and assigns, to be paid, observed, or performed, have been paid, observed, and performed, up to the date of these presents: And that notwithstanding any act, deed, or thing, by the said Enoch Humfreys made, or done, or knowingly permitted or suffered, he the said Enoch Humfreys now hath power to assign the said premises unto the said Stephen Buck, his executors, administrators, and assigns, for the term, and subject as in manner aforesaid, free from incumbrances: And that he, the said Enoch Humfreys, his executors, and administrators, and all other persons lawfully or equitably claiming through or in trust for him, will, at all times, at the cost of the said Stephen Buck, his executors, administrators, and assigns, do and execute all such acts and assurances for further or better assuring the said premises unto the said Stephen Buck, his executors, administrators, and assigns, for the then residue of the said term, subject as in manner aforesaid, as by the said Stephen Buck, his executors, administrators, or assigns, shall be reasonably required. And the said Stephen Buck doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Enoch Humfreys, his executors and administrators, that he the said Stephen Buck, his executors, administrators, or assigns, will henceforth pay the yearly rent of thirty pounds by the said lease reserved, and observe and perform all the covenants and conditions therein contained, and by the lessee, his executors, administrators, or assigns, henceforth to be observed or performed, and will keep the said Enoch Humfreys, his executors and administrators, indemnified against all actions, suits, expenses, and claims, on account of the non-payment of the said rent, or any part thereof, or the breach or non-observance or non-performance of the said covenants and conditions, or any of them.

Covenants by the Assignee.

In witness, &c.

No. XIII.

WILL.

I, Thomas Hughes, of Dale, in the county of Warwick, gentleman, do hereby revoke all wills, codicils, and other testamentary dispositions heretofore made by me, and do declare this

to be my last Will and Testament. I give and devise all the messuages, farms, lands, and hereditaments situate in the parish of Dale, in the county of Warwick aforesaid, to which I shall be entitled at my decease, to the use of my eldest son John Hughes, and his assigns for his life, without impeachment of waste; with remainder, to the use of the first son of my said son John Hughes who shall survive me and shall attain the age of twenty-one years, in fee simple; but if there shall be no such son, then to the use of all and every the daughters of my said son John Hughes, in fee simple, as tenants in common; but in case any of the said daughters shall die under the age of twenty-one years without leaving lawful issue, then as well the original as the accruing share of such daughter or daughters so dying shall go over to the other or others of the said daughters in fee simple, and if more than one, as tenants in common. And in case all the daughters of my said son John Hughes shall die under the age of twenty-one years without leaving lawful issue, then to the use of my second, third, and every other son for his life, with remainder to the use of his sons and daughters, corresponding with the limitations and uses hereinbefore contained in favour of and limited to the sons and daughters of my said son John Hughes, yet so that every elder of such second, third, and every other son, and his sons and daughters, shall be always preferred to every younger of the same sons and his sons and daughters. And in case no person shall become entitled to a vested interest in the said hereditaments and premises under the limitations aforesaid, then to the use of my own right heirs for ever. I give and devise all and singular the messuages, lands, and hereditaments which I lately purchased of George Green unto my cousin Matthew Hughes, his heirs and assigns absolutely, subject nevertheless to the payment of the sum of £300, with which the said estate and hereditaments are at present charged under or by virtue of a certain indenture of mortgage, bearing date the 6th day of February 1846, and the interest thereof or so much thereof respectively as may remain unsatisfied at my decease, and I hereby expressly declare that, as between my representatives and my said cousin and his representatives, the said estate and hereditaments shall be the primary fund for the payment of the said sum of £300, and the interest thereof. I give and bequeath the sum of £5,000 £3 per cent. Reduced Annuities, which is now standing in my name in the books of the Governor and Company of the Bank of England, or so much thereof as shall be standing in my

name at my decease, and all the dividends which may be payable in respect thereof from and after my decease, unto George Evans, of the city of Chester, and Michael Potts, of Dale aforesaid, their executors, administrators, and assigns, upon trust that such trustees or trustee do and shall pay the dividends and annual income of the said annuities unto my son Henry Hughes until he shall become bankrupt, or become an insolvent within the meaning of an Act or Acts for the relief of insolvent debtors, or until he shall attempt to anticipate such dividends and annual income; and from and after the determination of the last-mentioned trust, do and shall, during the life of the said Henry Hughes, pay or apply the same dividends and annual income unto or for the separate use of the wife and child or children of the said Henry Hughes for the time being or any of them, or for the education or advancement of the said children or any of them in such proportions and in such manner as my said trustees or trustee shall in their uncontrolled discretion think proper; and from and after the decease of the said Henry Hughes I give and bequeath the said sum of £5,000 £3 per cent. Reduced Annuities unto Harriet Hughes, the wife of the said Henry Hughes, absolutely. And I give and bequeath unto my said trustees, their executors, administrators, and assigns, the sum of £3,000, upon trust, to lay out on or invest the same in their names in or upon such stocks, funds, or securities as they may in their discretion think proper, with power to vary the investments from time to time for any other stocks, funds, or securities as they may think fit, and from time to time to pay and apply all or any part or parts of the capital and annual income respectively of the said trust sum and investments, or any part or parts thereof respectively, to or for the benefit of my infant son Jacob Hughes, during his minority, as my trustees may think proper, and subject as aforesaid upon trust to hold the said trust sum and investments, in trust for my said infant son absolutely; my intention being that the said legacy to my said infant son shall not be contingent upon his living to attain the age of twenty-one years, but shall be a vested interest in him at my decease. And I do hereby declare, that the receipts of my said infant son, for any moneys which may be paid to him on account of the said legacy or the income thereof during his minority, shall be an effectual discharge to my trustees. And as to all the residue of my real and personal estate and effects, I give, devise, and bequeath the same respectively unto my eldest

son, John Hughes, his heirs, executors, administrators, and assigns absolutely. And I hereby appoint the said George Evans and Michael Potts executors of this my Will.

In witness whereof, I, the said Thomas Hughes, have hereunto set my hand the 3rd day of October, 1853.

Signed and acknowledged by the said Thomas Hughes as his Will, in the presence of us present at the same time, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses. } THOMAS HUGHES.

DAVID HIGGS.
BENJAMIN THOMPSON.

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END OF VOL. II.

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